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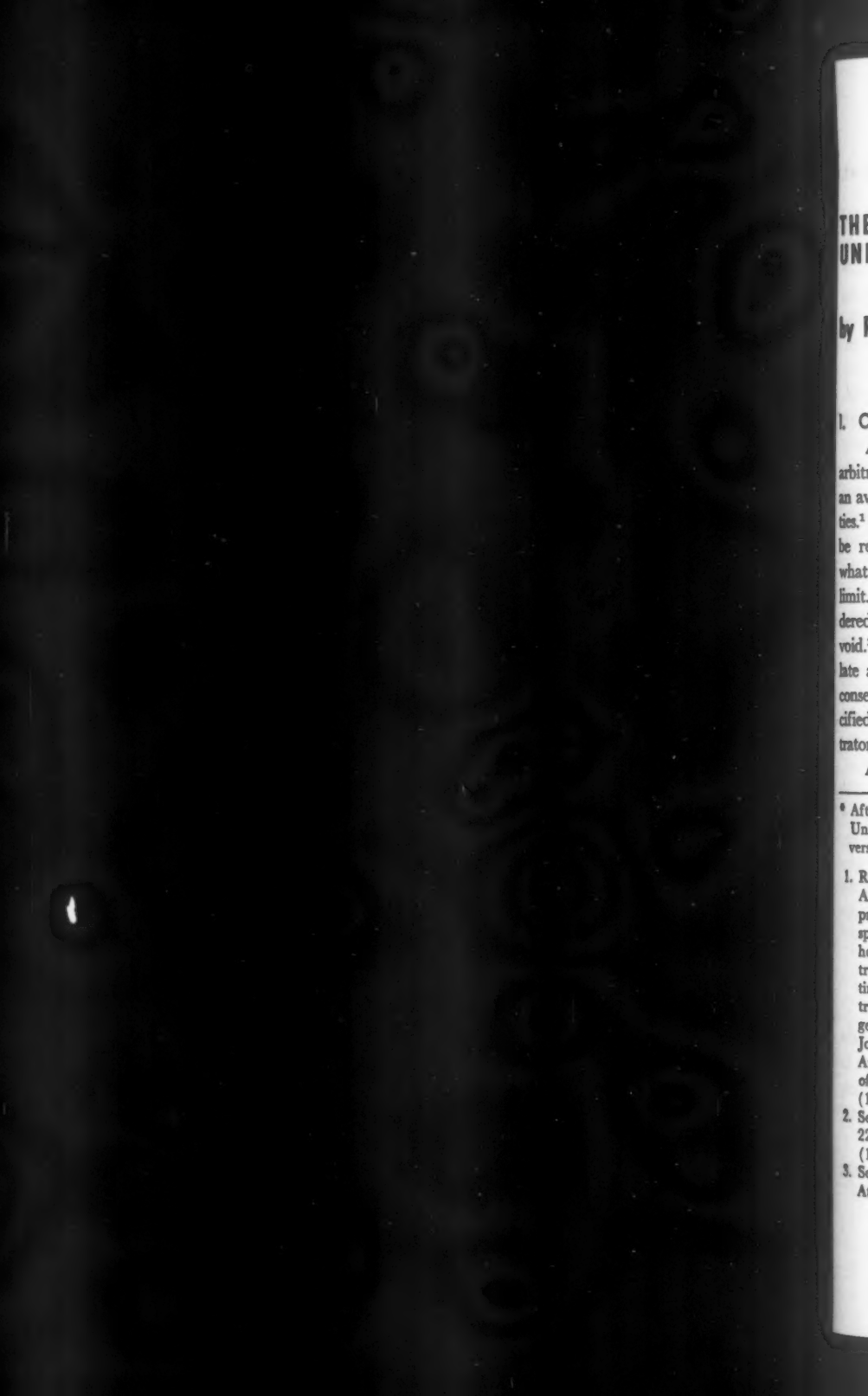

THE VALIDITY OF DELAYED AWARDS UNDER SECTION 301, TAFT-HARTLEY ACT

by Richard A. Givens*

I. Contractual Time Limits for Arbitration Awards

A large proportion of collective bargaining agreements contain arbitration clauses embodying a time limitation for the rendition of an award by the arbitrator after final submission of a case by the parties.[1] The purpose of these provisions is generally to cause awards to be rendered promptly, no consideration frequently being given to what should be the status of an award handed down after the time limit. At common law and under most state statutes an award rendered after the expiration of such a time limit was generally considered void.[2] This was so even though the contract did not stipulate that a late award should be invalid; it was reasoned that the parties had consented to be bound by an award only within the time limits specified and that a later award was beyond the authority of the arbitrator and therefore of no effect.[3]

A surprisingly large volume of litigation has arisen over the valid-

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* After undergraduate and graduate studies at Columbia College and the University of Wisconsin, Mr. Givens took his law degree at Columbia University School of Law. He is a member of the New York Bar.

1. Rule 37 of the Voluntary Labor Arbitration Rules of the American Arbitration Association provides: "*Time*—The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by the law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the Arbitrator." Other time limits may affect prior steps in the grievance procedure and arbitration process, with differing legal consequences in case of delay. See generally Note, Time Limitations Under the Arbitration Law, 28 St. John's L. Rev. 47 (1953); Collins, Arbitrability and Arbitrators, 13th Annual N.Y.U. Conf. on Labor 449, 468-69 (1960); Pollack, The Effect of Time Limitations on Arbitration Agreements, 8 Arbitration Journal 40 (1953).
2. See Annotation, 154 A.L.R. 1392 (1945); Morse, Arbitration and Award 223 (1872); Sturges, Commercial Arbitration and Awards, § 83, p. 352 (1930); 6 Williston, Contracts, § 1929, p. 5393 (1938).
3. See Georke Kirch Co. v. Georke Kirch Holding Co., 118 N.J. Eq. 1, 176 Atl. 902 (1935).

ity of delayed awards.[4] In such disputes, one party may feel entirely justified in insisting that the award is void because there had been no agreement to be bound by a delayed award, whereas the other party may feel that an attempt is being made to utilize technicalities to upset the award merely because it turned out to be unfavorable. Such disputes, in which both sides feel that they are entirely right, cannot be conducive to good will between the parties.

One way to prevent this particular source of friction under arbitration agreements is to specify in the contract the precise status of an award handed down after the time limit. However, there are also many other matters, concerning a multitude of possible contingencies, which could be specified in arbitration provisions, and in fact in contracts of all types. This is particularly true where the agreement is one between parties to a continuing relationship, as is the case under collective bargaining agreements. The remarks of Karl N. Llewellyn on the law of negotiable instruments are applicable: ". . . once a man starts thinking up unhappy contingencies and sets about the careful legal covering of himself against each of them, he has embarked upon a course which ends only with the incorporation of a fifteen volume encyclopedia of law and procedure, or else with plain exhaustion."[5] There will continue to be—and perhaps should be—many instances where the parties will not cover detailed contingencies such as the status of a late award in their contract.

And although it is unusual for an arbitrator to render his award after the time limit provided by the parties, in view of the large number of arbitration agreements in the United States, it cannot be expected as a practical matter that the frequency of such occurrencies will diminish greatly in the future. It is therefore desirable that some further means of dealing with these disputes so as to minimize friction and bitterness arising from them be evolved.

II. Lincoln Mills and a National Law of Collective Bargaining Agreements

Prior to the enactment of section 301 of the Taft-Hartley Act, the controlling source of law as to validity of labor arbitration awards in the United States was state common law or state statutory provisions, under which, as has been pointed out, late awards were generally held

4. See notes 2, 3, 66, 69, 70, 74.
5. Llewellyn, Meet Negotiable Instruments, 44 Colum. L. Rev. 299, 322 (1944).

void. However, section 301 conferred jurisdiction upon the federal courts over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ."[6] Three distinct possible views concerning section 301 have been advocated: (1) that the section merely confers jurisdiction upon the federal courts, with the governing source of legal principles remaining state law, (2) that this is the case, but that the section is unconstitutional because under Article III of the Constitution federal courts may be given jurisdiction only over specific classes of cases, including those "arising under" federal law, and that a case cannot "arise under" a statutory provision which provides no guides for the resolution of the case beyond conferring jurisdiction,[7] or (3) that federal courts are to develop the substantive law to be applied under section 301 from the purposes deducible from the Taft-Hartley Act and our other national labor laws.

The first Supreme Court decision dealing with the construction of section 301, *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*,[8] involved a suit by a labor organization to require an employer to pay disputed sums allegedly owing to individual employees. Although no opinion was joined in by a majority of the Justices, Mr. Justice Frankfurter's plurality opinion referred to possible constitutional difficulties and avoided them by holding that section 301 did not confer federal jurisdiction where only a right of the employees and not of the union itself was involved. Two years later, however, in *Textile Workers Union v. Lincoln Mills*,[9] the Court sustained federal jurisdiction where a union was seeking to compel an employer to proceed with arbitration, despite the fact that the relief which would be sought before the arbitrator would deal with benefits

6. 61 Stat. 156 (1947), 29 U.S.C. § 185.

7. See Frankfurter, J., in Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955) (dictum); Frankfurter J. dissenting in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 460 (1957); cf. Mendelsohn, Enforceability of Arbitration Agreements Under Taft-Hartley Section 301, 66 Yale L. J. 167, 190-94 (1956). The theory of "protective jurisdiction" might, however, have sustained the validity of the section in any event. See Burton and Harlan, JJ., concurring in Textile Workers v. Lincoln Mills, 353 U.S. 448, 460 (1957); Hart & Wechsler, The Federal Courts and the Federal System 744-47 (1953); Weshsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216, 224 (1948); cf. Miskin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953).

8. 348 U.S. 437 (1955).

9. 353 U.S. 448 (1957).

to individual employees. The Court further held that federal substantive law to be evolved "from the policy of our national labor laws"[10] would govern under section 301. Mr. Justice Frankfurter dissented, and two Justices concurred in the result but did not subscribe to the view that the law to be applied under section 301 was necessarily federal law.

In *United Steelworkers v. American Mfg. Co.*,[11] *United Steelworkers v. Warrior & Gulf Navigation Co.*,[12] and *United Steelworkers v. Enterprise Wheel & Car Co.*,[13] handed down on June 20, 1960, the Court again accepted federal jurisdiction over cases under section 301 involving enforcement of arbitration agreements (*Warrior & Gulf* and *American Mfg.*) and of an arbitration award (*Enterprise*), and determined the issues on the basis of its view of the policies implied by our national labor laws. In these cases, although there were concurring and dissenting opinions in each case concerning the merits of the Court's interpretation of federal law, no Justice asserted that federal jurisdiction was lacking, or sought to have state law applied to determine the issues in any of the cases.

Furthermore, in the enactment of the Labor Management Reporting and Disclosure Act of 1959, which includes the first major revisions of the Taft-Hartley Act since its enactment in 1947, no amendment to section 301 to reverse the result in *Lincoln Mills* was adopted or even proposed. This constitutes effective testimony to the acceptance of that ruling.

Accordingly, it may be safely assumed that the holding in *Lincoln Mills* that section 301 established a body of federal law to be evolved by the federal courts has become irrevocable, notwithstanding criticisms which have been made of the *Lincoln Mills* decision on the ground that its holding may not have been contemplated by Congress when section 301 was enacted.[14]

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10. Id. at 456.
11. 363 U.S. 564 (1960).
12. 363 U.S. 574 (1960).
13. 363 U.S. 593 (1960). For conflicting views concerning these decisions, compare, e.g., Hays, The Supreme Court and Labor Law, October term, 1959, 60 Colum. L. Rev. 901, 919-935 (1960) with Gould, The Supreme Court and Labor Arbitration, 12 Labor L.J. 331 (1961) and Davey, The Supreme Court and Arbitration: The Musings of an Arbitrator, 36 Notre Dame Law. 138 (1961).
14. See, e.g., Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957).

The Court's choice in *Lincoln Mills* seems a reasonable one because Congress had failed to specify in either the section itself or in legislative history what law was to be applied, and in that situation the Court had no alternative but to determine what construction would best effectuate the underlying objectives of the statute as a whole.[15]

The development of a national law of collective bargaining agreements under section 301 is likely to prove permanent because it is a logical outgrowth of the national scope of collective bargaining itself in many industries.[16] As our transportation facilities have improved, the nation has become an ever more interconnected economic unit.[17] More and more enterprises have become nationwide in scope, as have the unions which have sought to bargain with them.[18] With the enactment of the Wagner and Taft-Hartley Acts the legal basis for collective bargaining and the obligation to bargain collectively in industries affecting commerce also became nationwide in scope. Consequently, it had become anomalous by 1947 for the legal status of collective agreements to differ according to the laws of many different states, including states which did not recognize trade unions as judicial entities who could be held legally responsible for their acts.[19]

In order to determine the possible effect of federal substantive law under section 301 upon the doctrine at common law that arbitration awards handed down after a contractual time limit are void, it is necessary to determine the extent of federal jurisdiction under section

15. Cf. Jones, Statutory Doubts and Legislative Intention, 40 Colum. L. Rev. 957 (1940).

16. See Givens, Section 301, Arbitration and the No-Strike Clause, 11 Labor L.J. 1005, 1006-1008 (1961).

17. The economic consequences of the extension of markets are vividly set forth in Commons, "American Shoemakers, 1648-1895," in Commons, Labor and Administration, 219-266 (1913); cf. Thorp, Economic Institutions 93-96 (1928). The courts have recognized the growing national character of our economy in their changing attitude toward the federal commerce power. Compare Hammer v. Dagenhart, 247 U.S. 251 (1918), and United States v. E. C. Knight Company, 156 U.S. 1 (1895) with United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Women's Sportswear Mfrs. Ass'n., 336 U.S. 460, 464 (1949); Mandeville Island Farms v. American Crystal Sugar Company, 334 U.S. 219 (1948).

18. See Dulles, Labor in America, 95-100 (1949); Lipset, Trow & Coleman, Union Democracy 19 (1956); cf. Rose, The Relationship of the Local Union to the International Organization, 4 Labor L.J. 334 (1953).

19. See Comments, 66 Yale L.J. 712 (1957) and 59 Colum. L. Rev. 190, 195-198 (1959) and authorities cited for discussion of some of the complexities which have been encountered.

301 over cases involving the validity of delayed awards, and then to examine the relevant sources of substantive law and their impact upon the common law rule.

III. Jurisdiction Over Cases Involving the Validity of Delayed Awards Under Section 301

A. Suits to Enforce Awards

Once an arbitration award is rendered under a collective bargaining agreement providing for arbitration as a means of settling the dispute between the parties, refusal to abide by the award would constitute a violation of the contract. Hence a suit between an employer and a union "for" this "violation" of the contract would appear to be within the literal language of section 301.

The only doubt as to federal jurisdiction under section 301 in such cases arose from *Westinghouse*. The argument against jurisdiction ran that under *Westinghouse*, enforcement of the rights of individual employees was beyond the scope of section 301, and that enforcement of an arbitration award providing for benefits to individual employees fell within this category.[20]

However, the enforcement of an agreement to arbitrate in *Lincoln Mills* involved individual employee rights as much as the enforcement of an award, since the arbitration compelled in that case dealt with individual employee benefits. The enforcement of an award may be classified as a union right as distinct from purely a right of individual employees as readily as can be the enforcement of an agreement to arbitrate. And it would be futile to compel parties to go to arbitration but then to say that the resulting award could not be enforced. Furthermore, *Lincoln Mills*, by establishing that section 301 generated a federal substantive law of collective bargaining agreements, has removed the constitutional problem which was one of the primary reasons for the denial of jurisdiction in *Westinghouse*.

In part for some of these reasons, a majority of the Court of Appeals decisions between the decision in *Lincoln Mills* and the decisions of June 20, 1960 which dealt with this question, sustained federal jurisdiction over suits to compel compliance with arbitration awards under

20. See Mississippi Valley Elec. Co. v. IBEW, 278 F.2d 764 (5th Cir.), vacated, 285 F.2d 299 (5th Cir. 1960); Textile Workers v. Cone Mills, 166 F. Supp. 654 (M.D.N.C. 1958), reversed, 268 F.2d 920 (4th Cir. 1959), cert. denied, 361 U.S. 886 (1959). The initial ruling denying jurisdiction in *Cone Mills*, prior to its reversal by the Court of Appeals, is analyzed and criticized in Note, 59 Colum. L. Rev. 153, 154-55 (1959).

collective bargaining agreements in industries affecting interstate commerce.[21] In one of these decisions sustaining federal jurisdiction, *Enterprise Wheel & Car Corp. v. United Steelworkers*,[22] part of the decision of the arbitrator was set aside on the ground that he had departed from the correct interpretation of the collective bargaining agreement in granting back pay to discharged employees for a period after the expiration of the agreement. The Supreme Court reversed on the merits and upheld the award on this point, holding that the parties had bargained for the arbitrator's judgment and that the court should have declined to review the merits of the award.[23] After stating that the award should be remitted to the arbitrator solely to make certain computations, the Court said: ". . . in all other respects we think the judgment of the District Court [enforcing the award] should be affirmed. . . ."[24] This necessarily affirmed the ruling upholding federal jurisdiction which had also been sustained by the Court of Appeals, and constitutes a Supreme Court holding on the point.

The District Court in *Enterprise* noted that the arbitration resulting in the award in that case had been compelled in a suit under section 301,[25] but it would be absurd for a suit to compel arbitration to be the determinant of federal jurisdiction over the enforcement of the award. This would only encourage otherwise needless litigation to compel arbitration in order to assure jurisdiction to enforce the award. The Supreme Court, in its brief mention of the question of jurisdiction, noted that the Court of Appeals had agreed with the District Court that there was ". . . jurisdiction to enforce an arbitration award under a collective bargaining agreement. . . ."[26] Significantly, the Court then cited *Textile Workers v. Cone Mills Corp.*,[27] also relied on by the Court of Appeals, where jurisdiction to enforce an award

21. Textile Workers v. Cone Mills, 268 F.2d 920 (4th Cir.), cert. denied, 361 U.S. 886 (1959); A. L. Kornman Co. v. Amalgamated Clothing Workers, 264 F.2d 733 (6th Cir.), cert. denied, 361 U.S. 819 (1959); Enterprise Wheel & Car Co. v. United Steelworkers, 269 F.2d 327 (4th Cir. 1959), reversed in part but affirmed on this point, 363 U.S. 593 (1960); Oil Workers Union v. Delta Refining Co., 277 F.2d 694, 695, 696 (6th Cir. 1960). See also United Electrical Workers v. Worthington Corp., 236 F.2d 364 (1st Cir. 1956); 73 Harv. L. Rev. 1408 (1960); 45 Va. L. Rev. 739 (1959); 37 N.C. L. Rev. 500 (1959).
22. 269 F.2d 327 (4th Cir. 1959).
23. 363 U.S. 593 (1960).
24. Id. at 599.
25. 168 F. Supp. 308, 309-310 (S.D.W.Va. 1958).
26. 363 U.S. at 596.
27. 268 F.2d 920 (4th Cir.), cert. denied, 361 U.S. 886 (1959).

was sustained without any prior suit to compel arbitration having been involved. This is a clear indication that neither the Supreme Court nor the Court of Appeals regarded a prior suit to compel arbitration as necessary to jurisdiction to enforce the award.

This interpretation of *Enterprise* is borne out by the decision of the Fifth Circuit in *Mississippi Valley Elec. Co. v. IBEW*,[28] a suit to enforce the award of a joint labor-management committee. The Court of Appeals initially held that jurisdiction under section 301 was lacking on the authority of *Westinghouse*. However, after *Enterprise* was handed down by the Supreme Court, the Court of Appeals vacated its earlier ruling and sustained jurisdiction on the authority of *Enterprise*. Later cases have consistently sustained jurisdiction to enforce arbitration awards under collective bargaining agreements.[29]

Jurisdiction over suits to enforce awards thus flows logically both from the language of section 301 itself and from the enforceability of an agreement to arbitrate under *Lincoln Mills*. *Enterprise* is direct authority sustaining jurisdiction; it is irrelevant whether there has been a prior action to compel arbitration, as is indicated by the Supreme Court's citation of *Cone Mills* and by the subsequent decision of the Fifth Circuit in *Mississippi Valley*.

B. Suits to Vacate Awards

Where a collective bargaining agreement provides a time limit for the rendition of an arbitration award, an award handed down after that time constitutes a violation of the agreement, regardless of what the consequences of this violation may be. A suit between an employer and a union to determine the effect of such a violation of the agreement would therefore seem to be a suit "for violation" of a collective bargaining agreement within the literal language of section 301. Both the *suit* and the *agreement* are between an employer and a union as required by the language of the section. Further, the violation affects the rights of the employer and the union, even though the violation may have been *committed* by the arbitrator. The suit is one "for violation" because it is brought to redress alleged harm to the rights of the parties caused by the violation.

28. 285 F.2d 229, vacating 278 F.2d 764 (5th Cir. 1960). See 8 UCLA L. Rev. 652 (1961).
29. Textile Workers v. American Thread Co., 48 L.R.R.M. 2534 (4th Cir. 1961); American Brake Shoe Co. v. Local 149, UAW, 285 F.2d 869 (4th Cir. 1961); Local 971 UAW v. Bendix-Westinghouse Air Brake Co., 188 F. Supp. 842 (N.D. Ohio 1960).

Jurisdiction under section 301 over suits to vacate awards also flows logically from jurisdiction over suits to enforce awards. A suit to vacate or enforce an award is in either case a suit to determine its validity. It would hardly be sensible to hold that the issue was within jurisdiction under section 301 in one case but not in the other; this would encourage a race to federal court to sue to enforce the award if federal jurisdiction were desired, or a race to a state court to sue to vacate, if federal jurisdiction were not desired.

In *Mengel Co. v. Nashville Paper Products Union,*[30] it was held, however, that jurisdiction under section 301 was lacking over the suit to declare an arbitration award invalid on the ground that the issue arbitrated was not arbitrable under the collective bargaining contract. This is not a precedent for denial of jurisdiction in suits to set aside awards as untimely because such suits are based upon an alleged *violation* of the agreement's time limit provision rather than upon a contention that, as in *Mengel,* there was ". . . *no contract* authorizing the arbitration . . ."[31] Furthermore, Mr. Justice Stewart, then sitting as Circuit Judge, dissented in *Mengel* on the ground that even this dispute stemmed from a controversy over the interpretation of the collective bargaining agreement, and hence fell within the jurisdiction conferred by section 301. One Federal District Court decision has also held jurisdiction lacking in a suit to vacate an award,[32] but this ruling has been disapproved in a subsequent decision in the same district.[33] The majority of decisions have sustained jurisdiction over suits to vacate arbitration awards under section 301,[34] particu-

30. 221 F.2d 644 (6th Cir. 1955).
31. Id. at 647 (emphasis in original).
32. International News Service v. Gereczy, 160 F. Supp. 5 (S.D.N.Y. 1958).
33. Minkoff v. Scranton Frocks, Inc., 172 F.2d 870, 874 (S.D.N.Y. 1959) (sustaining jurisdiction in suit to enforce award).
34. Underwood v. Electrical Workers Local 267, 171 F. Supp. 102 (D. Conn. 1957); Central Packing Co. v. Packinghouse Workers, 48 L.R.R.M. 2583 (D. Kan. 1961); Central Metal Products Co. v. UAW Local 1249, 48 L.R.R.M. 2452 (E.D. Ark. 1961); Local 971, UAW v. Bendix-Westinghouse Air Brake Co., 188 F. Supp. 842 (N.D. Ohio 1960) (jurisdiction exercised over suit to vacate award without discussion of jurisdictional issue).
Several cases in the Southern District Court of New York have denied jurisdiction in suits to *stay* arbitration. Children's Dress Union v. Frankow Mfg. Co., 183 F. Supp. 671 (S.D.N.Y. 1960); Consolidated Laundries Corp. v. Craft, 185 F. Supp. 631 (S.D.N.Y. 1960); Hall v. Sperry Gyroscope Co., 183 F. Supp. 891 (S.D.N.Y. 1960); In re Karagheusian, Inc., 48 LRRM 3074 (1961). Suits to stay are in any event distinguishable from suits to vacate awards because in the former, the arbitrator may himself

larly after jurisdiction over suits to enforce awards was confirmed in *Enterprise*.[35] Similarly, jurisdiction has been accepted over suits to modify awards,[36] and over suits to vacate awards upon removal from state courts.[37]

It thus appears firmly established that section 301 confers jurisdiction upon the federal courts over both types of cases in which the validity of delayed arbitration awards under collective bargaining agreements are likely to be in issue: suits to enforce awards and suits to vacate awards as untimely. These conclusions flow logically from the language of section 301, from the decision in *Lincoln Mills* that agreements to arbitrate are enforceable under section 301, and from the confirmation of jurisdiction over suits to enforce awards in *Enterprise*. The likelihood that federal jurisdiction and the applicability of federal substantive law in disputes concerning the validity of delayed arbitration awards will stand the test of time is further strengthened by the nationwide character of collective bargaining in many industries, coupled with the importance of arbitration as a part of the machinery of collective bargaining.

Under *Lincoln Mills*, once it is accepted that the federal courts possess jurisdiction over suits to enforce awards or to vacate arbitration awards as untimely, federal law governs the validity of these awards. This is so even in cases in the state courts, because federal law, where applicable, is as binding in state as in federal courts.[38]

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decide not to proceed, making judicial action unnecessary and in this sense there is yet no "violation" of the agreements which can be claimed. However, in the light of *Lincoln Mills*, it would seem likely that jurisdiction will ultimately be upheld here also, as indicated in Cuneo Eastern Press, Inc. v. Bookbinders Union, 176 F. Supp. 956 (E.D. Pa. 1959); New Bedford Defense Prod. v. Local 1113, UAW, 160 F. Supp. 103 (D. Mass. 1958).

35. See Central Packing Co. v. Packinghouse Workers, 48 L.R.R.M. 2583 (D. Kan. 1961); Central Metal Products Co. v. UAW Local 1249, 48 L.R.R.M. 2452 (D. Ark. 1961); Local 971 UAW v. Bendix-Westinghouse Automotive Air Brake Co., 188 F. Supp. 842 (N.D. Ohio 1960).
36. Ingraham Co. v. Electrical Workers, Local 260, 171 F. Supp. 103 (D. Conn. 1959); cf. Local 743, IAM v. United Aircraft Corp., 190 F. Supp. 464 (D. Conn. 1961) (suit for reformation of contract).
37. Central Metal Products Co. v. UAW Local 1249, 48 L.R.R.M. 2452 (D. Ark. 1961); Local Union No. 971, UAW v. Bendix-Westinghouse Automotive Air Brake Co., 188 F. Supp. 842 (N.D. Ohio 1960). See Fitzsimmons, Removal Rights in Labor Litigation, 11 Labor L.J. 137 (1960); Weiner, Enforcing Labor Arbitration Agreements: A Federal Right Seeks a Favorable Forum, 13th Annual NYU Conf. on Labor 361, 372-76 (1960).
38. See McCarroll v. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322

IV. Relevant Sources of Substantive Law Under Section 301

In *Lincoln Mills* the Supreme Court said that substantive law under section 301 was to be fashioned "from the policy of our national labor laws" and that:

> ". . . The Labor Management Relations Act expressly furnishes some substantive law. . . . Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."[39]

State common law rules and state statutes are relevant under this standard, but are to be followed only if they are in accord with the objectives of federal labor legislation. As has been pointed out, the majority rule at common law and under state statutes has been that delayed arbitration awards were void.[40] However, there are a substantial number of decisions taking a contrary view.[41] Furthermore, some decisions under state statutes, particularly in Connecticut, have made a distinction between labor arbitration and commercial arbitration cases, holding that in the labor arbitration cases a late award is not necessarily void.[42]

(1957), cert. denied, 355 U.S. 932 (1958), 58 Colum. L. Rev. 278, 71 Harv. L. Rev. 1172; Weiner, Enforcing Labor Arbitration Agreements: A Federal Right Seeks a Favorable Forum, 13th Annual NYU Conf. on Labor 361, 376-385 (1960). Cf. Testa v. Katt, 330 U.S. 386 (1947).

39. 353 U.S. at 456-457.

40. See Note 2, supra.

41. See Hegeberg v. New England Fish Co., 7 Wash. 2d 509, 110 P.2d 182 (1941); Batten v. Patrick, 123 Mich. 203, 81 N.W., 1081 (1900); Bolhuis Lumber & Mfg. Co. v. Brewer, 252 Mich. 562, 233 N.W. 415 (1930); Damon v. Berger, 191 Pa. Super, 165, 155 A.2d 388 (dictum) (1959); cases cited note 42, infra. A reason for refusing to vacate an allegedly untimely award given in some cases has been that the procedural question involved was for the arbitrator himself to resolve under the circumstances. See Rosenthal v. Tannhauser, 279 App. Div. 902, 111 N.Y.S. 2d 221 (1st Dept.), aff'd, 304 N.Y. 812, 109 N.E.2d 470 (1952); cf. Note, Procedural Requirements of a Grievance Arbitration Clause: Another Question of Arbitrability, 70 Yale L.J. 611 (1961).

42. International Brotherhood of Teamsters v. Shapiro, 138 Conn. 57, 82 A.2d 345, 350 (1951); Danbury Rubber Co. v. Local 402, 145 Conn. 53,

In evaluating the relevance of the common law rule under section 301, it is significant that the common law rule evolved during a period of judicial hostility to arbitration,[43] a spirit directly contrary to that manifested by the Supreme Court in the June 20, 1960 decisions under section 301.[44]

The theory that an arbitrator's function is exhausted and that he becomes "functus officio" at the expiration of a contractual time limit even though its consequences are not specified, upon which the common law rule that late awards are void is based, was specifically rejected by the Court of Appeals in *Enterprise*:

> ". . . the award directed the Corporation to reinstate the grievants and compensate them for the time lost less the ten-day suspension period and less such amounts as they may have received from other employment; but the arbitrator failed to include in the award the amounts which had actually been earned or, by the exercise of due diligence, could have been earned by the grievants in other employment. It has generally been held that a final award must be certain in its terms or provide means and data by which it may be made certain by mathematical calculation, and that if it is deficient in this respect it must be vacated since the powers of the arbitrator are exhausted and the award cannot be resubmitted to him for correction or amendment. See 3 Am. Jur., Arbitration-Award, Secs. 93, 125; 104 A.L.R. 710, 718, 725.
>
> "If this rule were given effect in the pending case the award would be set aside, for it is obviously so incomplete that disputes may well arise as to the amounts of back pay which the employer is obliged to make to the discharged workers. We think, however, that the rule forbidding the resubmission of a final award, which was developed when the courts looked with disfavor upon arbitration proceedings, should not be applied today in the settlement of employer employee disputes. As pointed out in Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, Congress has clearly indicated that the arbitration of grievance disputes for the preservation of

138 A.2d 783 (1958); Local 63 v. Cheney Bros., 18 Conn. Supp. 230 (1953).

43. See Burstein, The United States Arbitration Act: A Reevaluation, 9 Labor L.J. 511, 514-516 (1958). The early cases were often suits upon bonds in which liability was denied because the condition of the bond, namely a timely award, had not been fulfilled. See Haggart v. Morgan, 5 N.Y. 422, 426 (1851).

44. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960).

industrial peace is to be encouraged and the Supreme Court has directed the federal courts to fashion a federal substantive law in accordance with this policy. This may readily be done in the pending case by requiring the parties to take steps to complete the arbitration so that the amounts due the grievants for loss of time will be definitely ascertained. . . ."[45]

The Supreme Court reversed that part of the Court of Appeals' ruling in *Enterprise* which had held that back pay could not be awarded for discharge in breach of collective bargaining agreement for a period after the expiration of the agreement. But it sustained ruling quoted above stating: "We agree with the Court of Appeals that the judgment of the District Court should be modified so that the amounts due the employees may be definitely determined by arbitration. . . ."[46]

If the reasoning underlying the common law rule and the rule under most state statutes is not persuasive in light of this ruling, a second possible source of federal law might be the United States Arbitration Act.[47] Prior to *Lincoln Mills,* federal courts encountered many difficulties in determining whether the Arbitration Act was applicable in labor cases,[48] because of an exemption in the statute as to contracts of employment.[49] Another reason for inapplicability of the Act in many cases is that an award can be enforced under the Act only if the agreement expressly provides for judicial enforcement.[50]

In *Lincoln Mills,* the Supreme Court relied only upon section 301, not the Arbitration Act. The court also explicitly declined to rely upon that statute in two companion cases to *Lincoln Mills.* In one case, the Court of Appeals had relied upon the Arbitration Act, but the Supreme Court, relying solely on section 301, stated: ". . . We follow in part a different path than the Court of Appeals, though we reach

45. 269 F.2d at 331-332. See generally, Busch, Does the Arbitrator's Function Survive his Award?, 16 Arbitration Journal 31 (1961); Jones, Arbitration and the Dilemma of Possible Error, 11 Labor L.J. 1023 (1960).
46. 363 U.S. at 599.
47. 9 U.S.C. § 1-14.
48. See Burstein, The United States Arbitration Act: A Re-Evaluation, 9 Labor L.J. 511 (1958); Mendelsohn, Enforceability of Arbitration Agreements Under Taft-Hartley Section 301, 66 Yale L.J. 167, 172-79 (1956); Note, 57 Colum. L. Rev. 1123, 1124-1126 (1957).
49. 9 U.S.C. § 1.
50. 9 U.S.C. § 9. See Lehigh Structural Steel Co. v. Rust Engineering Co., 59 F.2d 1038 (D. C. Cir.), cert. denied, 287 U.S. 626 (1932).

the same result. . . ."[51] In the second case the Court stated: ". . . Nor need we consider cases . . . holding that an order directing arbitration under the United States Arbitration Act is not appealable. The right enforced here is one arising under § 301(a) of the Labor Management Relations Act of 1947. . . ."[52]

It is also clear that the United States Arbitration Act is not one of our "national labor laws" as that term was used in *Lincoln Mills.* The legislative history of the Arbitration Act indicates that it was primarily intended to apply to commercial arbitration.[53] In *Warrior & Gulf,* the Supreme Court explicitly stated that decisions concerning labor arbitration under section 301 must be governed by different considerations than those which are applicable to purely commercial arbitration:

> "Thus the run of arbitration cases . . . becomes irrelevant to our problem. . . . In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes had quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."[54]

If the United States Arbitration Act were applicable, not merely as an analogy[55] but as a source of policy, it might lend some limited support to the view that late arbitration awards are void, because section 13 of the Act provides that when a motion is made to confirm, modify or correct an award the moving party shall file "each written extension of the time, if any, within which to make an award"[56] and

51. General Electric Co. v. Electrical Workers Local 205, 353 U.S. 547, 548 (1957).
52. Goodall-Sanford, Inc. v. United Textile Workers, 353 U.S. 550, 551 (1957).
53. See Burstein, The United States Arbitration Act: A Re-evaluation, 9 Labor L.J. 511 (1958); Sturges & Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act. 17 Law & Contemp. Prob. 580, 618 (1952); Note, 42 Minn. L. Rev. 1139, 1142-1150 (1958).
54. 363 U.S. at 578. See also Lewis v. Benedict Coal Co., 361 U.S. 459 (1960).
55. See, e.g., Engineers Ass'n v. Sperry Gyroscope Co., 251 F.2d 133, 136 (2d Cir. 1957), cert. denied, 356 U.S. 932 (1958); Minkoff v. Scranton Frocks 172 F. Supp. 870, 877 (S.D.N.Y. 1959). Ingraham Co. v. Local 260, 171 F. Supp. 103 (D. Conn. 1959).
56. 9 U.S.C. § 13.

because § 10(e) of the Act states "where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion direct a rehearing by the arbitrators."[57] But the inapplicability of any principles deduced from the United States Arbitration Act in interpreting the policy of our national labor laws in cases under section 301 is confirmed by the fact that notwithstanding this language of § 10(e), the Court of Appeals in *Enterprise* directed a rehearing after the arbitrator had handed down his award *without any reference to whether the time had expired,* and on the basis of policy derived from section 301 without reference to § 10(e). As indicated earlier, the Supreme Court affirmed this ruling.

If neither the common law, state statutes, nor the United States Arbitration Act afford guidance as to the validity of delayed arbitration awards under section 301, it is necessary to turn to the underlying source of substantive law under that section laid down in *Lincoln Mills,* namely the policies of our national labor laws. The findings and declaration of policy contained in the amended National Labor Relations Act specifically state that one of the purposes of protecting the rights of employees to organize and bargain collectively is that it "... promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions. ..."[58]

In order to determine what approach would resolve the problem of delayed awards so as to most encourage friendly adjustment of industrial disputes, it is necessary to consider the practical objectives served by arbitration as part of collective bargaining. Former Secretary of Labor Mitchell has written in *The Arbitration Journal*: "... You all know the factors which have been responsible for the increasing use in recent years of arbitration to settle industrial grievances. Undoubtedly all of you are also familiar with the fact that court procedures are generally not well adapted to the needs of modern labor-management relations and are, in addition, too costly, too prolonged and too technical."[59] This approach of disregarding technical concepts formerly held applicable where necessary to promote workable arbitra-

57. 9 U.S.C. § 10(e).
58. 61 Stat. 136 (1947), 29 U.S.C. § 151.
59. Mitchell, Arbitration and Industrial Peace, 9 Arbitration Journal 26, 27 (1954).

tion procedures led the Court of Appeals and the Supreme Court to disregard the "functus officio" doctrine in *Enterprise*.

Recognition of the objective of arbitration of avoiding technicalities as expounded by former Secretary Mitchell would appear to require that a party who wished to insist that an award handed down after the expiration of a time limit was void should make that intention known in the agreement itself or by notifying the other side and the arbitrator *prior* to the handing down of an award. Any other view would encourage parties to sit back and see whether an award was favorable, and then accept it if favorable but reject it as untimely if unfavorable.

Once the parties have gone through the trouble and expense of conducting a hearing before an arbitrator, it seems likely that many if not most would prefer to extend the time rather than to insist that the proceedings should begin over again. To start over again, of course, lengthens rather than shortens the proceedings as a whole.

The Court in *Lincoln Mills* quoted the Senate report on the Taft-Hartley Act as making one of the objectives of section 301 to ". . . promote a higher degree of responsibility upon the parties to such agreements, and . . . thereby promote industrial peace."[60] The "responsibility" which this language indicates should be expected of the parties would require an objecting party to raise the question of the untimeliness of an award before it is handed down.

This is also the approach recommended by the National Conference of Commissioners on Uniform State Laws in the Uniform Arbitration Act, in which it is stated: ". . . A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him."[61] The same provision has been specifically recommended by the National Academy of Arbitrators for application to labor arbitration cases.[62]

The reasoning underlying this view is well expressed by Milton H. Schmidt in his decision as arbitrator in a case where the validity of a prior award found to be untimely was upheld.[63] Mr. Schmidt stated in part:

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60. 353 U.S. at 454, quoting S. Rep. No. 105, 80th Cong., 1st Sess. 17 (1947).
61. Uniform Arbitration Act § 8(b) (1955), 9 U.L.A. p. 78, 81.
62. Proposed United States Labor Arbitration Act § 9(b), 34 L.A. 942, 946 (1961).
63. Bendix-Westinghouse Automotive Air Brake Co., 36 L.A. 724 (1961). See also Modernage Furniture Corp., 4 L.A. 314, 315 (1946).

"The next question is whether the lateness of the award destroyed its validity. My answer to that question is 'no' . . ."

* * *

"It seems to me a fair guess that had the award been more favorable to the union no attempt would have been made to nullify it—at least no attempt by the union. I cannot speculate what the company might have done in those circumstances. In my view it would be unfair and unreasonable to construe this Agreement to mean that the union (or for that matter, the company) could first look into the package, after asking that it be forwarded, and then decide that since it did not like the looks of the contents, the arbitrator was exceeding his authority when he sent it on. Such a privilege would be tantamount to seeing whether you are dealt a good hand before announcing that the deal is out of turn.

* * *

"The principles of waiver which I have held to apply here are embodied in the proposed Uniform Arbitration Law drafted and recommended by the National Conference of Commissioners on Uniform Laws (Section 8(b)), 9 U.L.A. pp. 76, 81 (1957), as well as in the proposed United States Arbitration Act adopted by the National Academy of Arbitrators in 1959 (Section 9(b)) 34 LA 942, 946."[64]

The policies of our national labor laws, the source laid down in *Lincoln Mills* as the governing criterion in cases under section 301, for these reasons appear to dictate that a delayed award should not be held void unless the arbitrator's continued exercise of jurisdiction is challenged prior to the rendition of the award.[65]

It remains to determine whether the cases so far decided under section 301 and under the Railway Labor Act, which must of course be recognized as one of our national labor laws, are in accord with

64. 36 L.A. at 729-731. In reaching his decision, the arbitrator relied upon both failure to object and affirmative conduct to establish waiver.

65. This view is in accord with the underlying principle of waiver recognized even by decisions at common law and under state statutes, although none of these cases which have been found specifically pass on the question of whether failure to object alone amounts to waiver as recommended by the commissioners on Uniform State Laws and by the National Academy of Arbitrators. See, e.g., Fudickar v. Guardian Mutual Life Ins. Co., 62 N.Y. 392, 405 (1875); Campbell v. Automatic Dye & Products Co., 162 Ohio St. 321, 123 N.E. 2d 401, 405 (1954); Parks v. Cleveland Ry., 124 Ohio St. 79, 177 N.E. 28, 29 (1931); In the Matter of Arbitration Between Famous Realty, Inc. and William Savage, Inc., 283 App. Div. 957, 130 N.Y.S. 2d 281 (2d Dept. 1934); Application of Building Service Employees International Union, 60 N.Y.S. 2d 811 (Sup. Ct. 1946); Nathan v. Jewish Center of Danbury, 20 Conn. Supp. 183, 129 A.2d 514 (1955).

the view expressed by the National Academy of Arbitrators and the Commissioners on Uniform State Laws, or with the common law rule.

V. Federal Judicial Precedents Concerning Delayed Awards

A. The Railway Labor Act Cases

There are two Railway Labor Act cases dealing with the validity of delayed awards. In *Brotherhood of Railway Clerks v. Norfolk Southern Ry.*,[66] an untimely award was held invalid. There, the applicable provision of the Railway Act[67] made it mandatory that a time limit for the rendition of this type of award be set, thus indicating a statutory policy of strict enforcement of time limitations not applicable under section 301. The award also dealt with the provisions of an entirely new collective bargaining agreement rather than with grievances under an existing contract. In arbitration concerning such new contractual provisions, entirely different considerations are involved, altering the function of time limits as well as other aspects of the arbitration process. An agreement to arbitrate a dispute over new contractual provisions reflects the relative bargaining strengths of the parties at that particular time, whereas the provisions of the contract and not relative bargaining positions are the basis for grievance arbitration. It may well be that a party would be unwilling to agree to arbitrate a dispute over new contractual provisions at a later time, after the expiration of the original time limit; but this should not be the case in grievance arbitration, where the parties have usually agreed to arbitrate *all future* disputes during the term of the contract as well as the *particular* dispute involved. This may account for the specific statutory provision for a time limit, as well as for the result in *Norfolk*.

The profound differences in the function of grievance arbitration and arbitration of new contract terms have in fact led to a holding that agreements to arbitrate provisions of new contract terms are not enforceable under section 301.[68] If arbitration of new contract terms

66. 143 F.2d 1015 (4th Cir. 1944).

67. 45 U.S.C. § 158(i).

68. Boston Printing Pressmen's Union v. Potter Press, 141 F. Supp. 553 (D. Mass. 1956), aff'd, 241 F.2d 787 (1st Cir. 1957), cert. denied, 355 U.S. 817 (1957); Couch v. Prescalite Mfg. Corp., 191 F. Supp. 737 (D. Ark. 1961). A state court has, however, held awards as distinct from agreements to arbitrate concerning new contracts enforecable under federal as well as state law. Broadway-Hale Stores v. Retail Clerks, 48 L.R.R.M. 2967 (Cal. App. 1961).

is outside the scope of the policies of section 301, a precedent dealing with that type of arbitration is not relevant in considering the effect of time limits in grievance arbitration cases under section 301.

In the second decision under the Railway Labor Act, *Brotherhood of Sleeping Car Porters v. Pullman Co.*,[69] an objection of the validity of a grievance arbitration award on the grounds of untimeliness was rejected on two grounds: first, that since nothing in the applicable agreement provided that non-observance of the time limitation would invalidate the decision, a late award should not be considered void, and second, that the party objecting to the validity of the award had not protested when notified that a delay would occur.

In holding that a delayed award was not necessarily void, the *Pullman* ruling appears to be in accord with the views of the National Academy of Arbitrators and the Commissioners on Uniform State Laws, since there had been no protest prior to rendition of the award.

B. Decisions to Date Under Section 301

There have been only two cases under section 301 directly presenting the issue of the validity of delayed arbitration awards.

In *United Textile Workers v. Textile Workers Union of America*,[70] an award in a dispute under the A.F.L.-C.I.O. No-Raiding Pact was upheld although rendered after the expiration of the contractual time limit. The contract provided:

> ". . . The Impartial Umpire shall decide any case referred to him within 30 days unless an extension of time is agreed to by the parties to the dispute or is requested by the Umpire and agreed to by the parties. The decision of the Impartial Umpire in any case referred or submitted to him under the terms of this Agreement shall be final and binding."[71]

The award was rendered more than 30 days after the case was referred to the Umpire. Nevertheless, the District Court held the award valid:

> "Because the impartial umpire is vested with exclusive and continuing jurisdiction under the No-Raiding Agreement to decide claims of violation of said Agreement, and because the

69. 200 F.2d 160 (7th Cir. 1952).
70. 30 L.A. 416 (United States District Court, N.D. Ill. 1958), aff'd, 258 F.2d 743 (7th Cir. 1958).
71. 30 L.A. at 418.

> Agreement provides that 'the decision of the Impartial Umpire in any case referred or submitted to him under the terms of this Agreement shall be final and binding' the award of arbitrator, although issued more than 30 days after submission of the case to him, was not void."[72]

The court relied on two factors: that as in most collective bargaining agreements the award of the arbitrator was declared to be final and binding, and the special factor, presently only in some agreements, that a permanent arbitrator was involved.

On appeal to the Court of Appeals for the Seventh Circuit, the appellant in urging reversal, made the untimeliness of the award the first point in its brief; nevertheless the Court of Appeals affirmed the District Court's decision without mention of this point.[73]

The second case involving a delayed award under section 301 was *Local Union No. 71, U.A.W. v. Bendix-Westinghouse Automotive Air Brake Co.*,[74] where a suit was filed in the Ohio state courts seeking to have an arbitration award vacated on the ground, among others, that the award was handed down after the expiration of a contractual time limit. The case was removed to the Federal District Court, which accepted jurisdiction under section 301. The court held that under the Supreme Court's decisions on arbitrability[75] the interpretation of the agreement as to the effect of the expiration of time limit should be resolved by arbitration. The court therefore refused either to vacate the award or to declare it valid, leaving the issue for a second arbitration proceeding. Portions of the decision of Arbitrator Milton H. Schmidt sustaining the validity of the award involved in this case have been previously quoted.

The court's decision, leaving the matter to a second arbitration, is, of course, inconsistent with the established common law rule on delayed awards. Under that common law rule, a delayed award would have been declared invalid without the need for any further proceedings in the matter. However, to require a second arbitration proceed-

72. 30 L.A. at 419.

73. 258 F.2d 743 (7th Cir. 1958). Other aspects of this case are discussed in Meltzer, The Supreme Court, Congress and State Jurisdiction over Labor Relations II, 59 Colum. L. Rev. 269, 295-301 (1959) and in 59 Colum. L. Rev. 202 (1959).

74. 188 F. Supp. 842 (N.D. Ohio 1960).

75. United Steelworkers v. Warrior & Gulf Navigation Company, 365 U.S. 574 (1960); United Steelworkers v. American Manufacturing Company, 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Company, 363 U.S. 593 (1960).

ing is also inconsistent with *Enterprise* and with the *United Textile Workers* decision, where the validity of the questioned awards was determined judicially without requiring a second arbitration. To require such a second arbitration—perhaps followed by further judicial proceedings—appears harmful to the speedy resolution of industrial disputes which is, as former Secretary Mitchell wrote, one of the chief aims of industrial arbitration.

VI. Conclusion

Under the majority view at common law and under most state statutes an arbitration award handed down after the expiration of a contractual time limit was held void. However, section 301 of the Taft-Hartley Act as interpreted in *Lincoln Mills* has made the policies of our national labor legislation rather than state common or statutory law the governing standard in cases within federal jurisdiction under that section. Cases involving the validity of delayed awards in industries affecting interstate commerce appear to be within jurisdiction of the federal courts under section 301 because they are suits "for violation" of agreements between employers and unions. The conclusion that federal jurisdiction applies in such cases flows logically from *Lincoln Mills,* is confirmed by the ruling in *Enterprise,* and is consistent with the ever more national character of collective bargaining in many industries.

The rule which appears most consistent with the policies underlying section 301 is that an award handed down after a contractual time limit is nevertheless valid unless an objection has been made prior to the rendition of the award. This is the rule recommended by the Commissioners on Uniform State Laws and the National Academy of Arbitrators. The common law concept that an arbitrator is necessarily "functus officio" after a time limit has expired was expressly rejected by the Court of Appeals in *Enterprise,* and its ruling on this point was approved by the Supreme Court. To date no case under section 301 has followed or endorsed the common law rule, whereas the *Pullman* and *Textile Workers* cases are consistent with the views of the National Academy of Arbitrators and the Commissioners on Uniform State Laws.

From the limited number of decisions now available, it appears that the common law rule need not be followed under section 301.

Because of the limited number of authorities available to date, however, it is not yet possible to predict with any substantial certainty

the treatment which a delayed award attacked on the grounds of untimeliness may receive. Therefore, it is still necessary for the parties and for the arbitrators to consider what should be done if it is expected that an award may be delayed. If a party believes that for some reason the passage of time has prejudiced his position, the arbitrator should be asked to relinquish jurisdiction as soon as the time limit has expired so as to be sure that any objection to the award as untimely will not be waived. On the other hand, if a party would prefer not to have to go through a second arbitration, steps should be taken to secure an extension of time or waiver of the delay by both parties. Similarly, an arbitrator who does not believe that a fair award can be rendered within the time limit for any reason should, of course, raise the question with the parties before the expiration of the time limit.

The problem of delayed arbitration awards is only one of many which arise in grievance arbitration under collective bargaining agreements where the agreement itself is silent. Where section 301 confers jurisdiction, under *Lincoln Mills* the relevant sources of substantive law are the policies of our national labor laws. Under this approach, section 301 affords an opportunity to develop a truly modern law of collective bargaining agreements suited to the needs of industrial relations today. It provides an opportunity for the courts to re-examine on their merits such concepts as the common law rule on late awards, which were developed during a period of judicial hostility toward arbitration and may no longer be appropriate to responsible industrial relations.

CONFLICT OF LAWS IN COMMERCIAL ARBITRATION

Editor's Note: Organized in 1923, the American Law Institute set as one of its goals "an orderly statement of the general common law of the United States." Included in that term was not only the law as developed by judicial decision, but also the law as developed "from the application by the courts of statutes that have been generally enacted and have been in force for many years."

The first Restatement of the Law on Conflict of Laws did not refer to commercial arbitration specifically. But a second Restatement, dated April 22, 1960, did include a section on arbitration, composed under the supervision of Willis L. M. Reese, of Columbia University Law School. "It is felt that commercial arbitration is of sufficient importance to warrant consideration in the Restatement," wrote Professor Reese. It is this Chapter on conflict of the laws governing commercial arbitration that we reproduce in this issue of *The Arbitration Journal,* with the permission of the Institute.

This draft, which will be submitted to the members of the American Law Institute at its annual meeting in May 1962, takes cognizance of a marked change in the attitude of the judiciary to arbitration since 1920, when New York became the first State to enact a modern arbitration law. With the enactment by Congress of a Federal Arbitration Statute in 1925 and the adoption by nineteen other states (Illinois and California became the most recent, on August 24 and September 15, 1961, respectively) of laws enforcing agreements to arbitrate as well as arbitration awards, the problem of overcoming conflict of laws and interpretations becomes a compelling one.

Topic 5. Commercial Arbitration

Introductory Note: Commercial arbitration was originally in judicial disfavor. Viewing agreements to arbitrate disputes as attempts to oust them of jurisdiction, the common law courts refused to enforce such agreements or even to stay judicial actions brought in violation of them. Nor could the aggrieved party obtain more than

nominal damages in an action for breach of the agreement, since it was deemed that he could not have suffered injury by being forced to litigate his case before a court. This judicial attitude has now changed in consequence of the widespread enactment of statutes which in varying degrees declare arbitration agreements to be irrevocable and provide for their specific enforcement. These statutes differ rather widely in detail.

This Topic deals with the law governing the validity and effect of an arbitration agreement (§ 354j) and the methods for enforcing it (§ 354k). It is also concerned with the effect which will be given a foreign arbitration award (§ 354l). On the other hand, consideration is not given to the extraterritorial effect of an arbitration award that has been reduced to a judgment. Such a judgment enjoys the same status as any other judgment and is subject to the rules stated in Chapter 10.

§ 354h. Validity and Effect of Arbitration Agreement.

(1) *The validity of an arbitration agreement and the rights created thereby are determined by the law selected by application of the rules of* §§332-332b.

(2) *When the arbitration agreement is one provision of a contract, the law governing the validity of the agreement and the rights created thereby is the law which governs the validity of the contract as a whole under the rules of* §§ 332-332b.

(3) *The law governing the validity of an arbitration agreement determines whether a judicial action brought in violation of its terms can be maintained.*

Comment:

a. Rationale. Arbitration agreements are one kind of contract. The rules for ascertaining the law governing the validity of contracts in general (see Topic I of this Chapter) are applicable to them. So much has never been doubted with respect to their validity; there has been some difficulty, however, on the subject of their effects. An agreement to submit one or more disputes to arbitration differs from an ordinary contract in at least one important respect. This is that a suit for the recovery of money damages will never be an adequate remedy in the event of breach. Only nominal damages could be recovered in such a suit, since the plaintiff would find it impossible to prove that he had suffered compensable injury by having been forced to litigate the case before a court. It is here that the problem arises. What action should be taken to enforce a contract is in a sense a

question of remedy or procedure and therefore might be thought to be governed by the local law of the forum. This view, however, should not be applied strictly to arbitration agreements, although this has in fact been done by a considerable number of courts. Arbitration agreements have little practical value if suit can be brought in violation of their terms, and it is inconceivable that permitting such a suit to be brought would be required by the strong public policy of the forum (see § 612). The actual outcome of a dispute may be affected, since, among other things, arbitration gives no right, as does frequently a court action, to trial by jury, and judicial review of an arbitral award is more limited than the review of a court decision. To permit the local law of the forum to decide whether or not resort to the courts is precluded by the existence of an arbitration agreement would be contrary to one of the most basic purposes of Conflict of Laws, namely, that rights arising out of a transaction should not vary from state to state but rather should be governed by a single law. The question should therefore be determined by the law which governs the validity of the agreement itself.

b. The governing law. The rules for ascertaining the law governing the validity of arbitration agreements, and the rights created thereby, are the same as those found throughout the entire field of contracts. An arbitration agreement is governed by the local law of the state selected by application of the rules of §§ 332-332b. This is the local law of the state chosen by the parties, if they have made such a choice, under the circumstances stated in § 332a. Otherwise, it is the local law of the state selected by application of the principles set forth in § 332b.

Frequently, the arbitration agreement will refer only to disputes arising under a certain contract and will itself form part of that contract. When this is the case, the law governing the validity of the contract as a whole will govern the validity of that arbitration agreement. Provision by the parties that arbitration shall take place in a certain state is persuasive evidence of an intent on their part that the local law of this state should govern the contract as a whole. This is true not only because the provision shows that the parties had this particular state in mind; it is also true because the parties must presumably have recognized that arbitrators sitting in that state would have a natural tendency to apply its local law. The dictates of convenience likewise support application of this law, since it will presumably be the one with which the arbitrators are most familiar. The

local law of the state where the contract provides that arbitration is to take place will therefore usually be applied to determine the validity of the contract itself provided, at least, that this state has some other substantial connection with the contract. This law will in any event determine questions relating to the manner in which the arbitration is to be conducted (see § 354i).

Illustrations:

1. In state X, A and B enter a contract which by its terms is to be performed in X, and whose validity, under the rules of §§ 332-332b, is governed by X local law. The contract provides that any disputes arising thereunder shall be submitted to arbitration. Under X local law, arbitration agreements are irrevocable in the sense that a court will not entertain a suit brought in violation of their terms. A, however, sues B for breach of the contract in state Y which still retains the common law rule that a suit will not be stayed by reason of the existence of an arbitration agreement. A's suit will be stayed or dismissed.

2. Same facts as in Illustration 1 except that it is state X which retains the common law rule and state Y which has adopted the modern rule that suit will not be entertained in violation of an arbitration agreement. The Y court will entertain A's suit.

3. In state X, A and B enter a contract which by its terms is to be performed in state Y. The contract provides that any disputes arising thereunder shall be submitted to arbitration in X. Whether or not suit can be entertained in violation of the terms of the arbitration agreement will be determined by the law governing the validity of the contract as a whole. The fact that the contract calls for arbitration in X furnishes a strong, but not conclusive, indication that the parties intended that X local law should govern the validity of the contract and the rights created thereby.

c. Powers of arbitrators. The law which governs the validity of an arbitration agreement under the rule of this Section determines the powers and duties of the arbitrators. This law therefore determines whether the arbitrators must render a monetary award or whether they can require specific performance of the contract.

d. Formalities. The law which governs the validity of an arbitration agreement under the rule of this Section determines what formalities, if any, are required to make the agreement legally effective. This law therefore determines whether the agreement must be in writing and, if so, whether the writing must follow any prescribed form and whether it must be signed by both of the parties.

e. The great majority of States of the United States have enacted statutes which provide for the stay of actions brought in violation of arbitration agreements and, in addition, sometimes authorize the courts to order that the parties proceed to arbitration in accordance with the terms of their agreement. Some of these statutes apply only to agreements to arbitrate existing disputes; others extend their protection to agreements to arbitrate future disputes as well.

Reporter's Note:

The majority of the cases that are directly in point hold that the enforceability of arbitration agreements is governed by the local law of the forum. These cases, however, are relatively few in number, and many of them were decided prior to the enactment of modern arbitration statutes. It is not believed that they would generally be followed today.

The rule of this Section has the support of the most recent decision in point. *Miller v. American Ins. Co.,* 124 F. Supp. 160 (W.D. Ark. 1954); *cf. Fox v. The Giuseppe Mazzini,* 110 F. Supp. 212 (E.D. N.Y. 1953; *Arnold Bernstein Shipping Co. v. Tidewater Commercial Co.,* 84 F. Supp. 948 (D. Md. 1949). The rule is also supported by *Estate Property Corp. v. Hudson Coal Co.,* 132 Misc. 590, 230 N.Y.S. 372 (Sup. Ct. 1928), and compare the suggestion of Mr. Justice Frankfurter in his concurring opinion in *Bernhardt v. Polygraphic Co.,* 350 U.S. 198 (1956) that the widespread adoption of modern arbitration statutes may induce courts which had previously held that the revocability of arbitration agreements is determined by the local law of the forum to hold henceforth that this question is determined by the law which governs the validity of the contract. But see *Matter of Gantt,* 297 N.Y. 433, 79 N.E. 2d 815 (1948) where a contract made in North Carolina where arbitration agreements are revocable provided for arbitration in New York. The court looked to New York law in refusing to stay an arbitration proceeding brought pursuant to the contract.

The Supreme Court of the United States has held that the enforceability of an arbitration agreement is a question of substance, rather than of procedure, under the rule of *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938); and that therefore the federal courts must determine the enforceability of such agreements in accordance with the law of the state in which they sit. *Bernhardt v. Polygraphic Co., supra.*

The proposed rule also has the support of the writers. Leflar,

Conflict of Laws 247 (1959); Note, "Commercial Arbitration and the Conflict of Laws," 56 Colum. L. Rev. 902 (1956); Heilman, "Arbitration Agreements and the Conflict of Laws," 38 Yale L. J. 617 (1929); Lorenzen, "Commercial Arbitration—International and Interstate Aspects," 43 Yale L. J. 716 (1934); Phillips, "Arbitration and the Conflict of Laws," 19 Cornell L. Q. 197 (1934); Stern, "The Conflict of Laws in Commercial Arbitration," 17 Law and Contemp. Prob. 567 (1952); *cf.* Stumberg, *Conflict of Laws* 272-278 (2d ed. 1951).

The proposed rule also accords with that prevailing in England. *Hamlyn & Co. v. Talisker Distillery.* [1894] A. C. 202.

A recent resolution of the Institute of International Law, of which several leading American scholars are members, adopted at the Neuchatel Session of 1959, provides in Article 13: "Every court before which one party begins judicial proceedings in violation of a submission to arbitrate or of an arbitral clause shall disseize itself of the matter at the request of the other party."

§ 354i. Method of Enforcement of Arbitration Agreement.

The method of enforcement of an arbitration agreement is determined by the local law of the forum.

Comment:

a. Under the rule of § 354h, the forum will refuse to entertain a suit brought in violation of an arbitration agreement unless such a suit could be maintained under the law governing the validity of the agreement itself. On the other hand, the forum will look to its own local law to determine what method, or methods, it should adopt to aid in the agreement's enforcement. So the forum will apply its own local law in determining whether to stay or to dismiss an action brought in violation of an arbitration agreement that is irrevocable under the governing law. The forum will apply the same law in deciding whether to order the parties to proceed to arbitration. Such an order is less likely to be made if arbitration is to take place in another state because of the reluctance of a court to order that an act be done in an area outside its jurisdiction. The considerations which will guide a court in determining whether to make such an order in this latter situation are set forth in § 94. The forum will likewise apply its own local law in determining whether it should enjoin maintenance of a suit that is being brought in a second state in violation of the arbitration agreement. The forum will apply the same law in deciding whether to appoint one or more arbitrators in

situations where arbitration cannot proceed unless such an appointment is made. A problem of this last sort frequently arises when one of the parties refuses to appoint an arbitrator in violation of the terms of the agreement.

Illustrations:

1. A brings an action against B in state X seeking an order that B proceed to arbitration in state Y. The contract was executed in Y and provided for arbitration in Y under the local law of Y. Both X and Y have modern arbitration statutes which render arbitration agreements irrevocable and provide under certain circumstances for their specific enforcement. The Y courts have construed their statute to permit a compelling of arbitration outside the state while the X courts have held to the contrary. The court will dismiss A's action. Y local law will be applied to determine whether suit can be brought in violation of the agreement. Beyond this, however, X local law will decide what method, or methods, can be employed to enforce the agreement.

2. A sues B for breach of contract in state X. B pleads in bar an arbitration agreement executed in state Y and containing a provision that it be governed by Y local law. Further, B asks that the court appoint arbitrators so that arbitration can proceed in X. Under the local law of Y a court is empowered to appoint arbitrators; the local law of X contains no such statutory authorization. In Y, agreements to arbitrate are irrevocable, while X follows the common-law rule. The court will refuse to entertain the action. It will, however, decline to appoint arbitrators, since this question goes to the method of enforcing arbitration agreements and therefore depends upon the local law of the forum.

Reporter's Note:

The rule of this Section has the universal support of the authorities. Note, "Commercial Arbitration and the Conflict of Laws," 56 Colum. L. Rev. 902, 910-912 (1956).

At least two courts have ordered arbitration to proceed in another state. *In re California Lima Bean Growers' Ass'n*, 9 N.J. Misc. 362, 154 Atl. 532 (Cir. Ct. 1931); *Nippon Ki-Ito Kaisha v. Ewing-Thomas Corp.*, 313 Pa. 442, 170 Atl. 286 (1934).

§ 354j. Enforcement of Foreign Arbitration Award.

A foreign arbitration award will be enforced in other states provided:

(1) *the award is enforceable in the state of rendition and was rendered in accordance with the terms of the arbitration agreement by an arbitration tribunal which had personal jurisdiction over the*

defendant and afforded him reasonable notice of the proceeding and a reasonable opportunity to be heard, and

(2) *the forum has judicial jurisdiction over either the defendant or his property and the cause of action on which the award was based is not contrary to the strong public policy of the forum.*

Comment:

a. Scope of section. The rule of this Section is of limited importance, since it applies only to simple arbitration awards. Most states provide by statute for a procedure whereby an award can be reduced to a judgment, and this step is usually taken by the successful party in the state of rendition after the handing down of the award. Judgments of this sort are covered by the rules set forth in Chapter 10; they are accorded the same extraterritorial effect as are other kinds of judgments and, as between States of the United States, are entitled to full faith and credit.

b. Rationale. The forum will not re-examine on the merits a foreign arbitration award that has not been reduced to judgment. It will not, on the other hand, enforce an award which does not satisfy certain basic requirements. First of all, the award must have been rendered in compliance with the terms of a valid contract to arbitrate (see § 354h). In addition, the award must meet the tests imposed upon a foreign judgment. That is to say, it must have been rendered by a tribunal which had personal jurisdiction over the defendant and which afforded him reasonable notice of the proceeding and a reasonable opportunity to be heard. Whether he was afforded reasonable notice of the proceedings and a reasonable opportunity to be heard will depend upon the considerations stated in § 75. Frequently, the parties will agree in their contract to submit all controversies to a certain arbitration tribunal. If so, the defendant's consent (see § 81) will afford a basis of personal jurisdiction over him provided that the terms of the contract have been complied with.

An award will also be refused enforcement if it is invalid or unenforceable under the local law of the state of its rendition. The forum will therefore consult the latter law to determine such questions as whether the arbitration tribunal was duly constituted, whether it followed appropriate procedures or otherwise exceeded its powers (see § 354h, Comment *c*), what was the effect of any such irregularities upon the validity of the award and whether the award was enforceable, that is to say, whether suit would lie to enforce the award, in

the state of its rendition. The local law of the state of rendition will also determine whether an award may be sustained in part and rejected in part. The forum may refuse to entertain a suit for the enforcement of an award that is claimed to be invalid or otherwise unenforceable in the state of its rendition on the ground that issues relating to the validity and enforceability of the award can be tried most conveniently in the latter state.

Finally, enforcement may be denied a foreign award which was based on a cause of action that is contrary to the strong public policy of the forum (see § 612). An award will not, as a practical matter, be based on penal cause of action. If one were to be so based, it would not be enforceable elsewhere (see § 611). It is, of course, a prerequisite to the enforcement of an award that the forum have judicial jurisdiction over either the defendant or his property.

Illustrations:

1. A contract between A and B, who are domiciled in state X, is entered into in that state and by its terms is to be performed there. The contract contains a provision that any disputes arising thereunder shall be submitted to arbitration. This provision is valid under X local law; it is, however, revocable under the same law in the sense that either party is free to renounce it and to institute court action at any time prior to the handing down of an award. A dispute arises under the contract, and B commences arbitration proceedings in X. A appears in these proceedings for the sole purpose of contesting their continuance on the ground that he has renounced the arbitration agreement and has taken court action in X. Nevertheless, the arbitrator proceeds with the arbitration and hands down an award in B's favor. X local law governs the validity and effect of the arbitration agreement (see § 354h), and the award is not enforceable in X. The award will not be enforced elsewhere. This is true even though arbitration agreements are not revocable under the local law of the state where enforcement of the award is sought.

2. Same facts as in Illustration 1 except that arbitration agreements are not revocable under X local law and that the award is enforceable in X. Enforcement of the award is sought in state Y where arbitration agreements are revocable. The award will not be refused enforcement on account of this local law rule of Y.

3. Same facts as in Illustration 2. The Y court will not refuse to enforce the award on the ground that the arbitrator made an error either of fact or of law in arriving at his decision.

4. Same facts as in Illustration 2 except that the award was based upon a dispute over a gambling debt. The Y court will

not enforce the award if it would be contrary to its strong public policy to permit recovery of a gambling debt.

c. Procedure of enforcement. The procedure for enforcing an arbitration award is determined by the local law of the forum. This law therefore decides whether the award must be sued on as any other cause of action or whether it can be reduced to judgment by a more summary method, as by motion.

Reporter's Note:

Foreign arbitration awards have been enforced almost invariably in the United States provided that (1) they were enforceable in the state of their rendition, (2) the cause of action on which they were based was not contrary to the strong public policy of the forum and (3) either the defendant or his property was subject to the judicial jurisdiction of the arbitration tribunal and the defendant was given reasonable notice of the proceeding and a reasonable opportunity to be heard. *Moyer v. Van-Dye-Way Corp.*, 126 F. 2d 339 (3rd Cir. 1942); *H. S. Cramer & Co. v. Washburn-Wilson Seed Co.*, 68 Idaho 416, 195 P. 2d 346 (1948); *Tanbro Fabrics Corp. v. Hymen*, 341 Ill. App. 396, 94 N.E. 2d 93 (1950); *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931); *Britex Waste Co. v. Nathan Schwab & Sons, Inc.*, 139 Pa. Super. 474, 12 A. 2d 473 (1940); *Taylor v. Basye*, 119 Wash. 263, 205 Pac. 16 (1922). *Contra*: *Shafer v. Metro-Goldwyn-Mayer Distributing Co.*, 36 Ohio App. 31, 172 N.E. 689 (1929). The rule also has the support of the writers. Stumberg, *Conflict of Laws* 277-278 (2d ed. 1951); Heilman, "The Enforceability of Foreign Awards in the United States," 3 Arb. J. 183 (1939); Lorenzen, "Commercial Arbitration—Enforcement of Foreign Awards," 45 Yale L. J. 39 (1935); Phillips, "Arbitration and Conflict of Laws," 19 Cornell L. Q. 197 (1933); Note, "Commercial Arbitration and the Conflict of Laws," 56 Colum. L. Rev. 902 (1956).

There has been some suggestion that the enforcement of sister State awards is required by full faith and credit. *Tanbro Fabrics Corp. v. Hymen, supra;* Note, "Commercial Arbitration and the Conflict of Laws," *supra.*

Enforcement of a sister State award has been refused on the ground that the cause of action on which the award was based was contrary to the strong public policy of the forum. *Banton v. Singleton*, 114 Ga. 548, 40 S.E. 811 (1902).

ARBITRATION IN THE ANGLO-SAXON AND EARLY NORMAN PERIODS

by Daniel E. Murray*

Little modern attention has been paid to the ancient sources and early developments of arbitration. With few exceptions, attention has been focused on current developments, seemingly without an awareness of the fact that much of what we think is "new" is actually very old. The period extending from the reign of Henry IV (1399) until 1799 has been superbly dealt with elsewhere[1]; however, the period extending from the Anglo-Saxon age through the reign of Richard II (1377-1399) seems to have escaped attention, with the exception of scattered references.[2] It is the purpose of this article to illustrate the development of arbitration during this early period.[3]

In the early Anglo-Norman period it is somewhat difficult to distinguish between jury determinations and arbitration proceedings. Both systems involved a submission of sorts in that the parties might "put themselves upon (*ponunt se super*)" a jury or upon one or more men as arbitrators of a dispute: "[t]he summons of a jury . . . is always in theory the outcome of consent and submission."[4] Further

* Mr. Murray took his LLB at the University of Miami and his LLM at New York University. He is now Assistant Professor of Law at the University of Miami.

1. Kyd, Awards (1st Am. ed. from the 2nd Eng. ed. 1808).
2. *E.g.*: Sayre, Development of Commercial Arbitration Law, 37 Yale L.J. 595, 597-598 (1928); Jones, Historical Development of Commercial Arbitration in the United States, 12 Minn. L. Rev. 240, 243-245 (1928) regarding arbitration in the early English Guilds; 5 Holdsworth, History of English Law 130 (1938); 6 Holdsworth 635, 12 Holdsworth 392-393, 13 Holdsworth 487. The Holdsworth volumes touch upon this period as well as later periods. Kyd, *id.* has a few scattered references to cases decided during the reign of Edward III (1327-1377).
3. The author has confined himself to English translations of the Year Books and Anglo-Saxon sources. The material taken from the *Curia Regis* Rolls was translated from the Latin by Fortune Bosco, D.J., Univ. of Rome, and the author would like to express his appreciation for this invaluable assistance.
4. II Pollock and Maitland, History of English Law 623 (2nd ed. 1923);

confusion might result from the fact that the term "friends" would be used to describe the composition of a jury as well as an arbitration panel; the notion seemed to be that both parties to a dispute should be represented by their "friends."[5]

Anglo-Saxon Period

It has been asserted that "there is apparently no germ of arbitration in Anglo-Saxon law, and the idea of arbitration is not one which the king's courts would favorably entertain at the time we find it making its appearance."[6] Nevertheless, it is submitted that the first faint glimmerings of arbitration appeared in the oldest series of the Kentish laws of Aethelberht (circa 602-603). After providing in specific detail the amount of *wergeld* for numerous injuries, the law provided that if a man's thigh was broken twelve shillings were to be paid as compensation, but "If he becomes lame, the settlement of the matter may be left to friends."[7] It has been suggested that the word "friends" meant the relatives of both parties.[8] It is to be noted that

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Van Caenegem, Royal Writs in England from the Conquest to Glanvill, 77 Selden Society 76-77 (1959).

5. Pollock, *id.* at 623-624, note 1. For thirteenth century illustrations of arbitrations by "friends," see V *Curia Regis* Roll, Richard I & John 46 (Dorset), 47 (Sumerset), 55-56 (Northumberland), 60-61 (Berk), 1207 (1931) and VII *Curia Regis* Rolls 16 John 183-184 (Suff') 1214 (1935). A somewhat similar concept can be discovered in the Visigothic laws (circa 649-652) which allowed the parties to appoint judges by agreement in lieu of judges appointed by the King. Scott, Visigothic Code 23, 40 (1910).
6. Sayre, Development of Commercial Arbitration Law, 37 Yale L.J. 595, 597-598 (1927-1928). This view should be compared with that of Adams, The Anglo-Saxon Courts of Law, printed in Essays in Anglo-Saxon Law 26, 53 (1876). "A very slight examination of the law cases printed in the Appendix will show how rarely the parties were allowed to push their differences to a final judgment. A compromise was always effected where compromise was possible. Arbitration was, perhaps, the habitual mode of settling disputes among the Anglo-Saxons. This arbitration might take the actual forms of legal procedure, without offering any anomaly to the Anglo-Saxon mind.

   In a legal system [under Edward the Confessor] so crude that it was almost an invariable habit not to press suits to a conclusion, but to compromise them in order to escape the consequences, the delays, or the uncertainties of strict law, arbitration was a more attractive resort, in nine cases out of ten, than the ordinary judgment of a regular tribunal." See also I Vinogradoff, Historical Jurisprudence 310, 345, 346, 354 (1920).
7. Aethelberht 65 §1., Attenborough, The Laws of the Earliest English Kings 13 (1922).
8. Id. at 178.

even at this early date, the voluntary nature of the settlement was indicated by the word "may." This law, however, failed to indicate clearly whether this arbitration was to be conducted as part of a court process or as an extra-judicial manner of settlement.

A much clearer illustration of an arbitration proceeding appeared in the laws of Hlothhere and Eadric (circa 673-685), Kings of Kent:[9]

> If one man charges another, after the other has provided him with a surety, then three days later they shall attempt to find an arbitrator, unless the accuser prefers a longer delay. Within a week after the suit has been decided by arbitration, the accused shall render justice to the other and satisfy him with money, or with an oath, whichever he [the accused] prefers. If, however, he is not willing to do this, then he shall pay 100 shillings, without [giving] an oath, on the day after arbitration.

This latter provision, when taken in conjunction with two preceding provisions,[10] seems to indicate that the arbitration procedure was to be utilized only in those cases where the accused had provided a surety; if the accused refused to provide a surety, "he shall pay 12 shillings to the King, and the suit shall be considered as open as it was before."[11] If this interpretation be correct, it would appear that the arbitration procedure was to be utilized in a limited number of cases. The last sentence of this law would seem to create a penalty for the failure of the accused to abide by the decision of the arbitrator. This law also seemed to differ from the former law of Aethelberht in that the utilization of the services of an arbitrator was made compulsory rather than optional.

The subject of arbitration was not directly referred to subsequently in the Anglo-Saxon laws with the exception of a somewhat ambiguous law enacted during the reign of Ethelred (circa 997) which provided that[12] ". . . where a *thegn* has a choice of two things, amicable settlement or legal process, and he chooses settlement, that is to be as binding as a legal sentence." If the words "amicable settlement" be given a modern interpretation as meaning the result of friendly negotiations between the parties, then it would seem to have no reference to any type of arbitration, but rather to the "love-day" or day

9. Hlothhere and Eadric 10, Attenborough, *supra* note 7 at 21. Compare translation in I Eng. Hist. Documents 360-361 (1955).
10. Hlothhere and Eadric 8 and 9., Attenborough, supra note 7 at 21.
11. Ibid. Compare translation in I Eng. Hist. Doc., supra note 9, at 360.
12. IV Ethelred 13 § 3, I Eng. Hist. Documents supra note 9, at 405. Compare translation in Robertson, The Laws of the Kings of England 71 (1925).

assigned for settlement between the parties out of the presence of the court which apparently was a common practice in the Anglo-Norman period.[13] However, a letter which was sent to King Edward the Elder approximately one-hundred years before the enactment of this law perhaps tends to indicate that arbitrators were used to expedite these "amicable settlements." A dispute was waged over some land, and King Alfred "ordered that they should be brought to agreement (then he [Alfred] ordered an arbitration),[14] and I [the writer of the letter] was one of the men appointed to do it. . . ." Various oaths were made and a deed was produced, "and when we were reconciling them at Wardour, . . . Then it seemed to all of us who were at the arbitration that Helmstan [the defendant] was nearer to the truth on that account." The case seemingly was settled after the decision of the arbitrators by the giving of an oath by the defendant. The plaintiff subsequently attempted to recover the land, but he then "retired from the dispute."

An examination of thirty-five Anglo-Saxon cases discloses that at least thirteen of them were "compromised," or the parties were "reconciled" at the intervention of the then King or by the "friends" of the parties.[15] At this period, the dividing line between arbitration and mediation would appear to have been a shadowy one at best, and it is submitted that the majority of the thirteen cases could be characterized as true cases of arbitration, rather than mediation in the modern sense.[16]

Post Norman Developments

After the Norman Conquest it is remarkable to discover the repeating of this concept of Ethelred in the alleged laws of Henry I (early in the 12th century), which stated: "And all disputes which are brought to the notice of the shire court shall be settled thereat, either by amicable arrangement or by the rigour of judgment."[17] An apparent application of this principle was involved in a dispute that raged between the years 1124 and 1130 over the boundaries between

13. See for example, Maitland and Baildon, The Court Baron, 4 Selden Society 20, 47, 57, 74 (1891).
14. Letter from Ordlaf (?). The text is a collation of the translations in I Eng. Hist. Documents 501 (1955) and in the Appendix to Essays in Anglo-Saxon Law 338 (1876).
15. Essays in Anglo-Saxon Law, *id.* at 311, 313, 314, 320, 324, 335, 338, 347, 355, 360, 363, 368, 377.
16. Note 6, *supra.*
17. Alleged Laws of Henry I, VII, II Eng. Hist. Documents 459 (1953).

Cranfield and Crawley. Four men were selected from Cranfield and four from Crawley and four from another area to make the decision in accordance with the order of Henry I, David King of Scots, and the Bishop of Salisbury who had ordered "the settlement of these disputes and of the claim respecting these boundaries. . ." The document further recited that it was an "agreement."[18] It is submitted that the twelve men selected acted more as arbitrators than as a jury in the effectuation of this settlement.

The earliest case of arbitration that the author has discovered in the *Curia Regis Rolls* occured in 1206.[19] A plea of account was brought and the defendant put himself upon (*posuit se super*) two men and, if they were not available, upon two other men; the plaintiff did likewise. Each of them then put himself on the judgment (*consideracionem predictorum*) of these four men and one additional man. When the truth had been heard, they promised to abide by their (the arbitrators') judgment (*adquiescent ad considerationem eorum*). It is to be noted that this case involved the submission to arbitration during the pendency of a case, rather than an agreement to arbitrate in advance of any litigation.

During the same year at Suffolk[20] a defendant was attached for occupying a greater area of land of Humphrey than he should have after an action of novel disseisin. The defendant alleged that he and Humphrey had agreed to a reasonable exchange of lands, and they referred the case to the arbitration of lawful men selected by each of them (*et concessum fuit ita quod ipsi compromiserunt in legales homines ex utraque parte electos*). The arbitrators gave the land which Humphrey claimed to the defendant and gave a third party seisin of the close. Further proceedings in this case indicated that judicial effect was given to the award of the arbitrators.

Two of the *Curia Regis Rolls* for the period 1223-1224 tacitly imply that arbitration procedings were utilized in such widely dissimilar matters as the civil liberties of a town and conduct within a forest. In the first roll,[21] the Bishop of Norwich delegated four magistrates in order that at least two of them might be present to hear the report of four knights who "transacted the peace near Norwich be-

18. Charter of Anselm, id at 926.
19. Buckland, IV Curia Regis Rolls 145 (1929). Discussed in Flower, Introduction to the Curia Regis Rolls, 1199-1230 A.D., 62 Selden Society 292 (1943).
20. IV Curia Regis *id* at 237. Discussed by Flower, *id.* at 417.
21. Roll 2709, XI Curia Regis Rolls 544 (1955).

tween the ally Arundel and the same Bishop dealing with the civil liberties of Lenn'." This testimony was to be taken in order to know whether Arundel had ratified this promise. It might be asserted that these four knights acted in the nature of mediators, rather than arbitrators; however, the term "transacted" would seem to connote an arbitral role. The second roll[22] seems to indicate that a dispute was being litigated between one Thomas and one Gundred about Thomas' cutting wood in a forest belonging to Gundred. The dispute apparently was settled by Thomas and his men agreeing that they would not take anything from the forest, but "if they are convicted for (any) reasonable (amount of wood) cut, they promise that one of them who were convicted and could not give one-half mark, at the request of his friends will satisfy the demand of Gundred according to the abundance of his chattles (?) (*copiam catallorum suorum*)." The phrase "at the request of his friends" would seem to be an extra-judicial mode of arbitrating the amount of damages suffered for the cutting of wood in the event of a future breach of the agreement.

Early Year Book Cases

Based upon the relative paucity of reported cases in the early Year Books, it might appear that the jury system rapidly superseded its early contemporary arbitration in the settlement of litigation; however, this lack of reports might be deceiving. It is a well recognized fact that comparatively few of the cases in the Year Books ever came to any definitive conclusion. This phenomenon might be accounted for by the fact that arbitration "was continuously at work [which] probably explains why so few cases seem to come to any conclusion in the Middle Ages."[23] It would appear that this disinclination to decide cases was an outgrowth of the judicial conduct in the eleventh and twelfth centuries which probably reflected the early Anglo-Saxon notions.[24] Van Caenegem has described the eleventh and twelfth century dichotomy between theory and practice in the courts as:[25]

> the typical suit of the age was very different from the theoretical scheme of the law books. The actual cases which accorded with it were a minority. To the contrary. The typical would in reality

22. Roll 1462, *id.* at 294.
23. Sayles, Select Cases in the Court of King's Bench, 55 Selden Society XVII, note 4 (1936).
24. See note 6 *supra.*
25. Van Caenegem, supra note 4, at 41-42. For a similar concept see Bigelow, Placita Anglo-Normannica 131, 245 (1879).

> proceed as follows. What was usually expected of a law court was not a clear-cut decision, of right or wrong, on an issue on which the parties had failed to agree, but much more something in the nature of an effort to bring about a settlement of the litigation by an acceptable, honourable compromise. This might be brought about by the mediation of the court . . . or jurors from the neighborhood or arbiters, accepted or even elected by the parties, and might occur even after battle had been waged and things were taking a grave turn. . . . The feeling seems to have been that a real court decision of right or wrong, excluding anything that looked like a compromise, was a harsh and extreme measure.

Arbitration and the Justiciable Dispute Notion

It is surprising to discover that the present New York doctrine that the use of arbitration (under the New York Arbitration Statute) is limited to *justiciable* disputes[26] was anticipated as early as 1281 and 1388 in England with the court taking somewhat inconsistent positions. The first case[27] involved a most interesting, although abortive, attempt at international arbitration. Certain trespasses allegedly occured in Florence, Italy, and twenty-eight Italian merchants (as defendants) and the plaintiff allegedly submitted to arbitration in England. The award and the judgment founded on the award were quashed for three reasons: (1) The writ (for the original suit) emanated from the court in error for "it is not the custom of England that anyone answer in the Kingdom of England for any trespass made in a region outside, in time of war or other time; . . ." (2) The two arbitrators disagreed as to the award and the judgment was based upon the view of only one of the arbitrators. (3) Although the writ provided that two justices were appointed to determine the plea of arbitration, only one justice received the award and entered judgment upon it. It is submitted that this is the oldest case articulating the notion that there must be a justiciable controversy (in the sense of jurisdiction in this case) in order for there to be a valid arbitration proceeding.

Approximately one hundred years later, the court seems to have adopted an entirely different view.[28] In a former action, a man had

26. Sturges, Arbitration—What is it?, 35 New York Univ. L. Rev. 1032-1033 (1960).
27. Hall, Select Cases Concerning the Law Merchant, 46 Selden Society 36-39 (1930).
28. Stammok' v. Cherche, Year Books of 12 Richard II (1388-89), I Ames Foundation 164 (1914).

brought a writ of account against a feme sole as his receiver, and he alleged (in the instant suit) that she had made an accounting to him under the supervision of auditors. He then brought the instant writ of debt to recover the amount of the account; the defendant demurred on the basis that the plaintiff could not have a writ of account against a woman and that even though the woman made an accounting, it was ineffectual. The court agreed with this contention; then the defendant waived his demurrer and asserted that the parties had submitted to arbitrators who awarded that the defendants should have two sacks of wool and they should pay the plaintiff twenty-two pounds which was paid. Issue was joined and the report recites: "Which note. Query of this matter for it is a strange matter, it seems to me." It would appear that this case implies that even though the arbitration covered matters for which a writ would not lie (i.e., not a justiciable controversy) the arbitration would be valid. It might be asserted that the plea of payment under the arbitration award was the true matter in issue; however, the case seems to indicate that the joinder of issue was made on the point of the arbitration itself, rather than the satisfaction of the award.[29]

Proof of Awards and Covenant to Arbitrate

Three fourteenth century cases evidenced some confusion over the manner of pleading the fact of an arbitration award or a covenant to submit to arbitration. In the first case[30] (1312) involving an action for waste, one of the parties pleaded that a dispute over the right to lands had been referred by the parties to arbitrators who had made an award. The court inquired as to the proof of this arbitration and the party stated that he was ready to aver it; however, Bereford, C. J. ruled that the arbitration "is a matter to be proved by a specialty, and therefore no averment lieth." Nevertheless, in the Eyre of Kent (1313-1314) two of the reports of the case of *Scott v. Beracre*[31] seem to agree that Staunton, J., stated:

> You are not in Court Christian where the pleadings must be in writing, but you are under the common law, *by which an averment of the arbitration is sufficient.* (emphasis added).

29. De Banco Roll, *id.* at 166.
30. Cooper v. Delgod (or Delegold), Bolland, Year Book 5 Edward II, 33 Selden Society 175 (1916).
31. Bolland, The Eyre of Kent. 6 & 7 Edw. II, 27 Selden Society 23 (1912).

Perhaps, the cases can be distinguished because in the former case the "specialty" was not before the court, while in the latter case the submission indenture was produced; however, in neither case was the award of the arbitrators evidenced by any deed. Thirty-two years later, the Court of Kings Bench, on an appeal from the Eyre of Macclesfield,[32] held that in an action on a covenant to submit disputes to arbitration, it was error to compel the defendant to plead when the plaintiff had not produced the covenant of submission. This latter case was based squarely on the point that the defendant had refused to submit the disputes to the arbitrators, while in the two preceding cases the arbitrators had allegedly reached a determination. In short, the latter case was in reality a suit for specific performance of a covenant to submit to arbitration. The court made no assertion that specific performance would have been improper if the plaintiff had pleaded properly.

Arbitration vis-a-vis the Jurisdiction of the Courts

The relationship of arbitration vis-à-vis judicial litigation may be asserted in various ways, for example: (1) the plea of a pending arbitration as a bar to suit, (2) the plea of an agreement to arbitrate consummated during a pending suit as a bar to the continuation of the suit, and (3) the plea of an arbitration award as a bar to a re-determination of a controversy in a court. All of these questions were presented to the courts as early as the thirteenth and fourteenth centuries; however, the answers were not, in all cases, as final as one would like.

The nice question of whether a pending arbitration is a bar to the institution of legal proceedings was presented to the Court of Common Pleas as early as 1390.[33] The plaintiff brought a writ of trespass; the defendant pleaded that a writ of trespass for the same act had been brought previously before the Sheriff of London and that the parties had:

> put themselves on the arbitration of certain persons, agreeing that if they could not agree, they should return to the Mayor (of London) and the court, and that they should then proceed to final judgment; and we say that the arbiters never arbitrated, but the judgment is still pending and much discussed; . . .

32. De Wetenhale v. Arden, K.B. Roll, 20 Edw. III, Kiralfy, A Source Book of English Law 181 (1957).

33. Anon. v. Anon., 13 Rich. II, VII Ames Foundation 104-105 (Plucknett, ed. 1929).

The plaintiff then pleaded that the parties had put themselves on the arbitration of certain persons who never appeared, and the Mayor ordered that the plaintiff's suit was to be dismissed to sue again at common law. The defendant abandoned his first position by counting that the arbitration had been completed, and that the plaintiff had been awarded a sack of wool which the defendant gave to him. The plaintiff then pleaded that the original plea "went to the action," and he was not compelled to answer the new plea. Thirning, J. stated: "At the beginning you did not challenge his plea as going to the action, so etc." Rickhill, J., stated, "It is difficult for you to demur." The report states in referring to the first plea of the defendant, "And it was the opinion of the court that this went to the action." Unfortunately, this wording appears to be an interpolation,[34] and only by inference can it be said that the court ruled that a pending arbitration would be a bar (as going to the action) to a cause of action based upon matters encompassed within the arbitration proceedings.

In 1312, seventy-eight years prior to the above case, *Hardwick v. Wood et al*[35] enunciated the notion that arbitration proceedings

34. Plucknett's Introduction, *id.* at XXVI-XXVII and note 1, id at 105.

35. Bolland, Year Books of 5 Edw. II, 33 Selden Society 214 (1916). This case should be compared with the "submission" features of the following cases.

In the second year of King Edward II (1308-09) a *quid juris clamat* was brought against a tenant to compel his attornment, and during the course of the case, Bereford, J., stated:

> The writing shows three things: first, that the lessor leased to him for a term of eight years, and [secondly] that if [the lessee] was at costs and charges in the tenement he should at the end of the eight years have his costs and charges [repaid] upon a view [of the improvements] by good men, so that if he [the lessor] did not pay him [the lessee] at the end of the eight years, then the tenements should remain to [the lessee] until he should be fully satisfied for his costs and charges; . . .

The court compelled the tenant to attorn, but sustained the validity of the lease by stating "your other conditions about the costs and charges shall be saved to you." Brauneby v. Cokesale, Maitland, 17 Selden Society 63 (1903); Year Books, 1 & 2 Edw. II. In 1310 an action of waste was brought against a life tenant who pleaded that the deed provided "that if waste or destruction were made in these tenements, it should be redressed by an award of the neighbourhood without plea," and that he had committed no waste. The issue was joined, and the sheriff was commanded "to take an inquest on the manor." Neither the Year Book record nor the *De Banco Roll* indicates that the plea of an award of the neighborhood was bad.

Catesby (Prioress of) v. Blaston, Maitland, Year Books of 3 Edw. II, 20 Selden Society 182-183 (1905). Compare the contrary view of Coke. Litt.

cannot be used to oust the courts of their jurisdiction, a notion that received its fullest development in the well known case of *Kill v. Hollister* in 1746.[36]

Hardwick brought a writ of conspiracy against one William of Flent stating that he had brought a writ of entry against one Adam, and while the plea was pending:

> . . . They agreed, by the assent of both, and by an indenture made between them, on a certain loveday when they would submit themselves to the arbitration of arbitrators. Yet, while the loveday was pending, this same William came to Westminister, in our absence, and recovered against us to the value, contrary to our agreement and contrary to his own deed; . . .

Scrope, the defendant's serjeant, contended that if a party is impleaded in court and a certain day is given to plead, but in the country a release and a quitclaim is given, this will not entitle the other party to a writ of conspiracy if one of the parties comes to court and default is entered against the other. As stated by Scrope:

> for you knew very well that we had a day in Bench, and that, that being so, no deed made in the country can, by the common law, make void the assignment of the day in Bench. If, then, the land be lost, it is lost by your own default, and you have recovery by writ of right at the common law.

This theory was adopted by the court, for in the words of Spigurnel, J.:

> Seeing that you cannot say that he hath recovered the land by false allegation, for he hath recovered it by process of law, because you did not keep the day which you had in Bench, but made default—*for no deed made in the country can extinguish in such case the jurisdiction of the Kings Court*—this Court ruleth that you take naught by your writ, but that you be in mercy for your false claim. (emphasis added).

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536. It is true that the use of the word "neighbourhood" indicates that a jury rather than an arbitration panel was to be utilized; however, the notion that the submission was given in advance of any litigation and that it was to operate as a waiver of a "plea" is indicative of the arbitral nature of the provision.

36. Kill v. Hollister, 1 Wils. 129. Discussed by Sayre, supra note 2, at 604-05, and by Kyd, supra note 1, at 14 and 20. In the Kill case, the agreement to arbitrate was made before suit was filed, while in the case in the text, the agreement was made during the litigation. Thus, the facts were different, but they led to similar results.

Spigurnel, J., Brabazon, C. J. and Bereford, C. J. ruled, "Make your claim by a writ of right under the common law." Of course, in this particular case the denial of the efficacy of a submission to arbitration had no final adverse effect on the plaintiff because he subsequently could bring a writ of right to reclaim the land, but this early use of a clog to impede the use of arbitration is important.

Three cases decided in 1388 seemingly gave some recognition to the principle that a valid arbitration award would be a bar to any subsequent attempt to re-litigate controversies which came within the arbitration proceedings. In the first case,[37] the plaintiff sued the defendant under the statute of laborers for wrongfully retaining one of the plaintiff's servants who had breached a covenant of service with the plaintiff. The defendant pleaded that he and the plaintiff had submitted this controversy and other disputes to arbitrators who had awarded "eighteen pence, and a gallon of beer" to the plaintiff who accepted it. The fact of arbitration was denied, and issue was joined on this point.

The somewhat inconclusive case of *Bathe v. Jonet et al*[38] (1388) illustrates the plea of an arbitration award to an action for trespass. Bathe counted that the defendants beat and imprisoned him; the defendants pleaded that Bathe was the villein of Sir Matthew and that they as the servants of Sir Matthew took him back to Sir Matthew, and that Bathe and Sir Matthew voluntarily submitted themselves to arbitration "in respect of the same villeinage and of all other trespasses committed before that time by this same Sir Matthew or his ministers." The arbitrators allegedly awarded that Sir Matthew should make a charter of manumission to Bathe in return for Bathe's payment of a thousand pounds and a release of all trespasses. Bathe replied that the submission to arbitration was made by duress and coercion while Bathe was imprisoned for three months. The parties seemingly joined issue on the question of the submission and the parties were adjourned until next term. The *De Banco Rolls*[39] fail to indicate the final conclusion of the case; although the arguments of the serjeants indicate that they both considered that a valid arbitration award would be a bar to the action.

The third case, *Stalynburgh v. Daweson*,[40] would appear to be a

37. Anon. 12 Rich. II, I Ames Foundation 37 (Deiser, ed. 1914).
38. Bathe v. Jonet et al, 11 Rich. II, V Ames Foundation 168 (1937).
39. *Id.* at 170-174.
40. Stalynburgh v. Daweson, 12 Rich. II, I Ames Foundation 159 (Deiser, ed. 1914).

clear enunciation of the concept that an arbitration award was a conclusive bar to a subsequent re-litigation of the controversy. Dawson was charged (in a former suit) that he beat and assaulted Matilda Stalynburgh. Dawson pleaded that they had "submitted all of their disputes and debates to arbitration, and the arbitrators appointed a day on which the parties should appear before them, . . ." The plaintiffs replied and denied that they had submitted to arbitration; issue was joined and the petit jury found that the parties had submitted to arbitration, and the plaintiffs were in mercy for their false writ. The plaintiffs (Stalynburgh et vir) then brought the instant suit to attaint the petit jury for its allegedly false oath in an attempt to upset the verdict. The writ of attaint was abated because it was not brought in the vicinage where the arbitration occured. It would seem obvious that if the arbitration award would not be a bar to judicial determination, then the ingenious attempt of the plaintiffs to impeach the jury verdict sustaining the validity of the submission to arbitration was a very roundabout way of attacking the fact of arbitration—the attack on the jury verdict could only mean that a valid arbitration was a complete bar to a re-determination of the original controversy by a court.

Arbitration and Judicial Delay

Many of the modern day exponents of arbitration base their arguments upon the delays and expense inherent in the judicial system. These arguments seem reminiscent of Adams' description of the Anglo-Saxon view:[41]

> In a society which had no confidence either in its judges, its judicial process, or its very law itself,—which could devise no system of reform in the practice, nor of equitable protection against the evils, of that law,—it was certainly not surprising that men should seek a remedy outside the public tribunals, . . .

There seems to be little doubt of the accuracy of the above view during the Anglo-Saxon period, and a few scattered case reports indicate, perhaps, that this feeling persisted in the Post-Norman period when the judicial machinery seemed ineffective to the parties (or even the court itself) in pending suits. For example, the case of *Honesti v. Chartres*[42] (1291) would seem to indicate that the Ex-

41. Adams, The Anglo-Saxon Courts of Law, Essays in Anglo-Saxon Law 26-27 (1876).

42. Honesti v. Chartres, Hall, II Select Cases on the Law Merchant, 46 Selden Society 53-62, 148-150 (1930).

chequer Court in seeming desperation allowed the use of arbitrators during the process of the trial when the usual auditing procedures broke down in a complicated accounting action. Auditors appointed by the court reached an impasse upon certain legal questions; the parties then agreed upon two auditors who also were unable to agree on the reconciling of the accounts. Finally, the parties "having craved license of the Barons and Justices and having had it" consented that three merchants were to be joined to the two auditors who were all to be considered as arbitrators. They further agreed to be bound by the award of all of the arbitrators or:

> four or three shall agree upon as to the same matters premised, however the other two outstanding may object or protest against their verdict, the verdict of those three is to be upheld in all things and through all things as a firm judgment; the reasonings whatsoever of the aforesaid two of the residue of the same arbitrators who come against this being quashed.

Ultimately, the arbitrators produced their award in favor of the plaintiff, and the court entered a judgment upon it.

Two cases decided in 1299 and 1389 indicate that the courts' perennial problem of securing jurors[43] may have caused the parties to prefer arbitration in lieu of a jury determination as a part of the judicial process, rather than as an extra-judicial method of settlement. In a case[44] conducted in the Mayor's Court of the City of London, the plaintiff complained that he was imprisoned for a debt although he had paid it and had received "acquittances." The defendant denied that the acquittances were his deed and claimed a jury of merchants, both citizens and foreigners.

> Subsequently the parties submitted to the arbitration of John le Clerk, Coroner of the City, Robert Hardel, Geoffrey de Brakele and Reginald le Barber of Vintry, with power to add Richer de Refham, Sheriff, in case of disagreement. They awarded that Ralph pay Remund and Arnald 10 marks in full settlement.

An unusually complete record of arbitration proceedings appears in a case decided in 1389 in the Guildhall of the City of London.[45]

43. Plucknett, A Concise History of the Common Law 160, 165 (5th ed. 1956).
44. Thomas, Calendar of Early Mayor's Court Rolls (1298-1307) 43 (1924). This case is more fully reported in Hall, III Select Cases Concerning the Law Merchant, 49 Selden Society 16-18 (1932).
45. Costace v. Forteneye, Kiralfy, A Source Book of English Law 241 (1957).

The plaintiff sued the defendant for failure to accept and pay for some wine in accordance with a contract of sale. The jurors failed to appear on the date set for trial, and the sheriff was ordered to distrain them for a future day. Subsequently, the parties appeared and:

> . . . of their own pure and spontaneous wish, in open Court, put themselves upon the Arbitration of 4 honest men of the Craft of Vintners, to be chosen by Robert Herry, Vintner, so that the same, so chosen, are sworn in Court to inquire and tell the truth in the aforesaid matter, and so that whatever they, so chosen and sworn, shall say or decree in that matter before the Mayor &, the parties consent fully to perform and to stand by their award and judgment &.

The jurors (who apparently appeared after distraint) were discharged. Subsequently, the arbitrators made their "award and final judgment in said matter" which was given to the Mayor by the arbitrators, and it was "recited and recorded before the Aldermen in the Chamber in open court . . ." It is interesting to speculate that the difficulty in impaneling a jury in both of these cases might have prompted the parties to choose arbitration. It is also noteworthy that this utilization of arbitrators was done in a most commonplace manner with no indication that they were alien intruders in a court of law. On the contrary, the reception must have been friendly, for the Mayor's Court, on at least one occasion, authorized the use of an attachment to compel arbitrators "to produce their award in a dispute."[46]

Errors in the Arbitration Proceedings

From a few of the early cases, it is possible to piece together the fact that the courts had a well developed conception of the essential attributes of a valid arbitration proceeding. As previously stated,[47] if two arbitrators disagreed as to the award and the judgment was based upon the view of only one of them, it was invalid. Of course, if more than two arbitrators were appointed, the parties could agree to be bound by a decision of the majority.[48] And, even assuming that an award had been made, it would appear that if notice of it were not

46. Thomas, supra note 44, at 50.
47. See note 42, *supra.*
48. Hall, II Select Cases Concerning the Law Merchant, 46 Selden Society 53-62 (1930).
49. Bolland, The Eyre of Kent 6 & 7 Edw. II, 27 Selden Society 23-27 (1912).

given to a party he would not be liable for a breach of an agreement which provided that if either party refused to give effect to the judgment of the arbitrators, he was to give thirty pounds to the other party.[49]

Of course, if one of the arbitrators was "so feeble that he could not travel" to the situs of the arbitration, and the other arbitrators "would do nothing at that time," it would be a defense of a writ of debt based upon a breach of a convenant to arbitrate.[50]

Conclusion

This review of the early development of arbitration has disclosed one interesting paradox. The arbitral concept developed in the Anglo-Saxon "local" courts where it received widespread acceptance. After the Norman Conquest it was adopted by the Royal Courts, and its increased use there was seemingly matched by a decrease in its use in the local courts.[51] Whether this may be accounted for by the fact of a wider acceptance of the jury system, a decrease in the volume of litigation coming within the jurisdiction of the local courts, or simply the lack of published records which might disclose no real decrease, is a matter for speculation.

Inasmuch as the jury system itself developed as an outgrowth of an arbitral concept, it does seem strange to the author that modern courts continue to view arbitration as a hostile interloper into the judicial system; in effect the legitimate father is now considered to be the illegitimate child.

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50. Abbott of Cerle v. Anon. (1388), 12 Rich. II, I Ames Foundation 70 (1914).
51. It might be expected that arbitration would have been common in the fair courts. However, if the Fair Court of St. Ives is any criterion, arbitration was little used with only one case in this court being reported, and it involved only one arbitrator and a munificient award of four pence. Gross, I Select Cases Concerning the Law Merchant, 23 Selden Society 18 and 21 (1908). The utilization of arbitration in determining the right of tenants to a term of years was involved in the Manor Court of the Abbey of Bec (1249) when three different tenants claimed that they had leased different parcels of land for a term of years from the defendant's daughter, and the defendant undertook to guarantee the holding of the terms. At first, each tenant asked for an inquest, but they subsequently submitted to arbitrators who ruled in their favor. The reports seem to indicate that three separate "suits" were consolidated into one. Maitland, Select Pleas in Manorial and Other Seignorial Courts, 2 Selden Society 21 (1889). See also, Henry, Contracts in the Local Courts of Medieval England 94-95, 106 (1926).

READINGS IN ARBITRATION

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DIGEST OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

PARTICIPATION IN ARBITRATION DOES NOT BAR A SUBSEQUENT SUIT FOR RECISSION OF THE CONTRACT FOR FRAUD IN THE INDUCEMENT. Plaintiff obtained an award in arbitration and had it confirmed by judgment of the Supreme Court. He then brought an action for recission of the contract containing the arbitration clause on the grounds that the contract was obtained by fraudulent misrepresentations. The arbitration clause read: "In the event of any dispute of whatsoever nature between the parties under this agreement, the same shall be disposed of by arbitration . . ." The court held that the issue of fraudulent inducement was not a dispute that arose under the contract and therefore was not arbitrable, citing *Wrap-Vertiser Corp. v. Plotnick,* 3 N.Y.2d 17. Further, the court held that the prior initiation of and participation in the arbitration was not an election of remedies and therefore did not bar this subsequent suit for recission, because the question of election implies that there was full knowledge of the facts necessary to enable the party to make an intelligent and deliberate choice. *Royal Hair Pin Corp. v. Rieser Co.,* 218 N.Y.S.2d 773 (Heller, J.).

ARBITRATION PROVISION IN CHICAGO CIVIL AVIATION CONVENTION OF 1945 (see *Int'l Arb. J.* 1945 p. 20) IS APPLICABLE ONLY TO DISPUTES BETWEEN THE SIGNATORY STATES, AND NOT TO DISPUTES BETWEEN INDIVIDUAL CITIZENS OF SIGNATORY COUNTRIES. An overcharge made by the Dade County Port Authority against foreign airlines for services at Miami International Airport, was challenged by several Latin-American airlines. Its recovery was considered "purely domestic in character." Inasmuch as the dispute did not involve any violation of treaty provisions by the United States, the arbitration provision was not applicable, all the more as the courts are available for such disputes. *Aerovias Interamericanas de Panama, S. A. v. Board of County Commissioners,* 197 F. Supp. 230, 250 (S.D. Florida, Lieb, D. J.).

HOLDER OF LIABILITY INSURANCE POLICY WHICH DOES NOT CONTAIN UNINSURED MOTOR VEHICLE ENDORSEMENT HAS NO RIGHT TO ARBITRATION. An endorsement in the policy is the exclusive source of the right to arbitrate with the Motor Vehicle Accident Indemnification Corporation. Article 17-A of the Insurance Law confers no such right on anyone. *Motor Vehicle Accident Indemnification Corporation v. Walter,* 28 Misc.2d 899 (Gulotta, J.).

ARBITRATION OF UNINSURED MOTORIST CLAIM DENIED WHERE ACCIDENT OCCURRED OUTSIDE THE UNITED STATES OR CANADA. An automobile insurance policy required arbitration of disputes concerning accidents with uninsured motorists. The insurance company sought to stay arbitration on the grounds that the accident occurred in Italy, inasmuch as the policy provided: "This policy applies only to accidents, occurrences and loss during the policy period while the automobile is within the United States of America, its territories or possessions, or Canada, or is being transported between ports thereof." The court held that the only logical import of this sentence was to exclude coverage of the policy to accidents outside the United States or Canada. "Any other interpretation would be strained and illogical." *American Casualty Co. v. Foster,* 219 N.Y.S.2d 815 (Streit, J.).

AGREEMENT TO ARBITRATE FUTURE CONTROVERSY OVER ALLEGED VIOLATION OF MARGIN REQUIREMENTS OF THE SECURITIES EXCHANGE ACT HELD NOT ENFORCEABLE. In an action by stock buyers against the broker for losses suffered in securities transactions allegedly in violation of the margin requirements of the Securities Exchange Act of 1934, the broker sought to stay the action pending arbitration. The court denied the motion based on the wording of the Act that district courts of the United States have exclusive jurisdiction of violations of the act and that exclusive jurisdiction may not be waived. Analogy was also made to the case of *Wilko v. Swan,* 346 U.S. 427 (1953), where it was held that agreements to arbitrate future controversies under the Securities Act of 1933 were not enforceable. The court did go on to say, however, that "the holding in this opinion is not intended to suggest that arbitration is not available where an existing dispute is, upon the consent of the parties, submitted to arbitration." *Reader v. Hirsch & Co.,* 197 F. Supp. 111 (S.D. N.Y., Dawson, J.).

II. THE ARBITRABLE ISSUE

LICENSOR'S REFUSAL TO CONSENT TO ATTEMPTED SALE OF FRANCHISE HELD ARBITRABLE UNDER CONTRACT CONTAINING BROAD ARBITRATION CLAUSE. A franchise agreement for operation of dance studios provided that "the licensee shall not sell, transfer, assign, sublicense, mortgage or pledge the whole or any part of this agreement. . .without the written consent of the Licensor first had and obtained." The licensee attempted to sell the studios but was refused consent and claimed damages from the refusal and demanded arbitration of the claim of bad faith in refusing to grant consent. Special Term denied a motion to stay arbitration by the licensor, holding that whether the refusal to grant consent was a willful and deliberate act of bad faith was an issue for the arbitrator to determine. (N.Y.L.J. May 16, 1960, p. 13 col. 6, Loreto, J.). The Appellate Division affirmed, 11 A.D.2d 988 (1st Dept. 1961). In the Court of Appeals the licensor argued that no arbitrable dispute existed because, by the terms of the contract, rights therein were not assignable without his written consent which might be withheld for any or no reason; that being personal in nature the contract was not assignable without consent; and that the claim did not arise out of the contracts. In a memorandum decision the Court of Appeals affirmed, upon the authority of *Matter of Exercycle Corp. (Maratta),* 9 N.Y.2d 329. *Arthur Murray, Inc. v. Ricciardi,* 10 N.Y.2d 733, 219 N.Y.S.2d 275, cert. den. 368 U.S. 836 (1961).

SUBCONTRACTING OF WORK HELD ARBITRABLE ISSUE under arbitration clause of collective bargaining agreement requiring arbitration of grievances involving interpretation or application of contract provisions, notwithstanding the management rights clause in contract. Following the Supreme Court decisions of June 20, 1960 the court said ". . .it is our clear duty to follow the law of the land as laid down by the United States Supreme Court. Under that law, the dispute would be held arbitrable 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the. . . dispute. Doubts should be resolved in favor of coverage'." *Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO v. General Electric Co.,* 37 LA 389 (Conn. Sup. Ct. of Errors, King, J.).

ARBITRATION ISSUES UNDER UNINSURED MOTORIST ENDORSEMENT ARE NOT LIMITED TO QUESTIONS OF LIABILITY AND DAMAGES, but may extend to other questions of law and fact pertaining to the eligibility of the insured to recover. Even though the Third Department in *Phoenix Assurance Co. of New York v. Digamus,* 9 A.D.2d 998, 194 N.Y.S.2d 770, has held that such arbitration "is limited to the issue of negligence and the resulting question of damages," the First Department took a contrary view. In so doing it specifically disapproved the Special Term determination in *American National Fire Ins. Co. v. McCormack,* 15 Misc.2d 692, 182 N.Y.S.2d 899. Accordingly in the First Department the arbitration provisions in an uninsured motorist endorsement are not limited to the issues of negligence and damages. *Zurich Insurance Co. v. Camera,* 14 A.D.2d 669, 219 N.Y.S.2d 748 (First Dep't.).

DISPUTE OVER SENIORITY PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT ARE ARBITRABLE. A company promoted an employee to a job over four other employees who had more seniority with the firm. The union sought to arbitrate and the company refused, saying the matter was not arbitrable since the seniority provision of the contract was expressly made "subject to the relative ability and qualifications of the Employees concerned." The contract further stated that "The Arbitrator. . . shall have no power to add to, subtract from, or modify the terms of this Agreement." Citing the *American Manufacturing Co.* case, 363 U.S. 564, the court held this was an allegation of a violation of the contract, concerning a dispute between the parties as to the meaning and application of the collective agreement, and therefore arbitrable. *Southwestern Electric Power Co. v Local Union No. 738, Int'l Bro. of Electrical Workers, AFL-CIO,* 293 F.2d 929 (5th Cir., Jones, C. J.).

DISCHARGE FOR REFUSAL TO REPORT TO WORK HELD ARBITRABLE DESPITE NO-STRIKE PROVISION IN CONTRACT. Despite the cases that hold a union not entitled to a stay of an employer's suit for damages predicated upon a breach of the no-strike provision in a collective bargaining agreement, the court felt this was merely a motion to compel arbitration of a grievance, namely discharge without proper cause by reason of disputes arising under the agreement. The court said: "It is admitted by the Union that on one day some men did leave their work for at least a portion of a day. Whether that leaving was justified by the circumstances is a question for the arbitrator. If it was not justified, there is a further question of whether the drastic remedy of discharge of these men was a proper one under the

terms of the contract. In other words, this case is one precisely suited to the arbitration process under the agreement that the parties have made." ***Retail, Wholesale & Department Store Union, Local No. 1085, AFL-CIO v. Vaughn's Sanitary Bakery, Inc.,*** 196 F.Supp. 633 (M.D. Pa., Follmer, D. J.).

WHERE ARBITRATION CLAUSE IN COLLECTIVE BARGAINING AGREEMENT DID NOT CLEARLY EXCLUDE DISPUTES OVER DISCHARGE FOR INSUBORDINATION, DISPUTE IS ARBITRABLE EVEN THOUGH UNDER THE CONTRACT EMPLOYER SHALL BE "THE SOLE JUDGE OF THE QUALIFICATIONS OF ITS EMPLOYEES." In reversing, the Circuit Court of Appeals said: "Whether 'qualifications' is to include such matter as insubordination or is to be confined to such measures as skill, experience and physical condition is, at best, a debatable question. The intent to exclude from arbitration the dispute here involved does not, we are satisfied, appear from the face of the contract with the clarity which is essential." ***Operating Engineers Local 3 v. Crooks Bros. Tractor Co.,*** 30 U.S. Law Week 2137 (9th Cir., Merrill, J., Sept. 7, 1961).

QUESTIONS OF RETIREMENT HELD ARBITRABLE DESPITE COMPANY'S CONTENTION THAT ITS RETIREMENT POLICY HAS NEVER BEEN SUBJECT TO ARBITRATION. Citing the three *United Steelworkers* cases of June 20, 1960, the court said: "My interpretation of these cases is that if [the] contract provides for arbitration of disputes as to meaning or application of terms of agreement and either side files a grievance alleging that such a dispute exists, then the court's function is ministerial one of ordering arbitration." The court found three prerequisites under the Supreme Court decisions to give a union the right to submit a grievance to arbitration: 1) A collective bargaining provision for arbitration of disputes over interpretation or application of its terms; 2) A grievance alleging the company has violated the contract; and 3) A broad provision for arbitration without exclusions. The only way arbitration would have been denied here by the court is "if contract provides that retirement policy of company is not subject to arbitration." ***International Chemical Workers Union, Local No. 19, AFL-CIO v. Jefferson Lake Sulphur Co.,*** 197 F.Supp. 155 (S.D. Texas, Ingraham, D. J.).

ACTION BY VICE PRESIDENT OF CORPORATION TO COMPEL CORPORATE OFFICERS TO SIGN CHECKS TO PAY HIM HIS SALARY STAYED PENDING ARBITRATION. The court was of the opinion that the broad arbitration clause encompassed the dispute between the parties as to whether the petitioner was any longer entitled to be employed by the corporation in accordance with the terms of the contract and to be paid remuneration as provided by contract. *Fisher v. Arch-Bilt Container Corp.,* 219 N.Y.S. 2d 669 (Sup. Ct., Conroy, J.).

DISPUTE OVER CHANGE IN METHOD OF PAY FROM TONNAGE POOL TO REGULAR HOURLY BASE RATE WAS HELD NOT ARBITRABLE. The court said: "In this posture of the record the sole question for the Court is whether the alleged grievance is arbitrable under the provisions of the contracts." Then the court relied on a prior decision in *International Molders and Foundry Workers Union of North America, Local No. 214 (AFL-CIO) v. American Radiator and Standard Sanitary Corp.,* Civil No. 3948, where the grievance involved was a determination that a job

covered under the Wage Incentive Agreement should no longer be subject to incentive application. The decision in that case that the grievance was not arbitrable was carried over to this decision, since the facts were almost identical with this grievance. *General Drivers, Warehousemen and Helpers Local Union No. 89 v. American Radiator and Standard Sanitary Corp.*, 196 F. Supp. 942 (W.D. Ky. Shelbourne, D.J.).

DISPUTE OVER CLOSING DOWN OF PLANT FOR INSUFFICIENT BUSINESS HELD ARBITRABLE UNDER BROAD CLAUSE. In reversing the decision of Special Term (204 N.Y.S.2d 998; digested in *Arb. J.* 1960, p. 210) the court said: "The collective bargaining agreement provides for the submission to arbitration of all grievances in the categories which it describes and of all questions of contract interpretation and performance. On their face, the grievances complained of are within the scope of the contract. Whether or not they are meritorious and were, in the circumstances presented, within the contemplation of the parties, are for determination by the arbitrator and their intrinsic rightness or wrongness may not be weighed by the court." *Fownes Bros. & Co. v. Consolidated Glove Cutters and Shavers Union Local 1714*, 14 App. Div.2d 235, 218 N.Y.S.2d 764 (Third Dep't., Taylor, J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

FEDERAL COURT APPLIES LOCAL STATE LAW IN DIVERSITY ACTION TO ENFORCE ARBITRATION AWARD. A Delaware and Wyoming corporation whose principal place of business was Wyoming brought an action in the federal court of that state to enforce an award against a Colorado corporation. The court found that the contract to arbitrate was executed in Colorado and therefore looked to the law of that state to ascertain when and under what circumstances the courts may review an arbitration award. *Gaddis Mining Co. v. Continental Materials Corp.*, 196 F.Supp. 860 (D. Wyo., Kerr, D.J.).

CORPORATION NOT BOUND BY ARBITRATION CLAUSE IN PREINCORPORATION AGREEMENT. Issues raised in a stockholder derivative suit for an accounting, injunction and other incidental relief were not referable to arbitration under a preincorporation stockholders' agreement providing for arbitration of disputes among parties thereto respecting provisions of the agreement or its interpretation. "It is clear that the preincorporation agreement executed by the parties was intended to cover only the relationship among the stockholders, *inter se*." *Hotcaveg v. Lightman*, 27 Misc.2d 573 (Sup. Ct., Rabin, J.).

FEDERAL ARBITRATION ACT DOES NOT PROVIDE INDEPENDENT BASIS FOR ORIGINAL FEDERAL JURISDICTION PERMITTING REMOVAL TO FEDERAL COURT. Replying to the contention that *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), cert. granted 362 U.S. 909, cert. dismissed pursuant to stipulation 1960, 364 U.S. 801, held that the United States Arbitration Act created a national substantive law relative to arbitration agreements affecting commerce or maritime transactions, the court said that the Arbitration Act does not provide an independent basis for original federal jurisdiction for removal purposes. *Victorias Milling Co. v. Hugo Neu Corp.*, 196 F. Supp. 64 (S.D. N.Y., Edelstein, D.J.).

INDIVIDUAL EMPLOYEE HAS NO CAUSE OF ACTION AGAINST EMPLOYER WHERE UNION REFUSES TO PROCESS HER GRIEVANCE THROUGH ARBITRATION. The plaintiff sued her employer to recover severance pay subsequent to her discharge. Prior to this action the union, after reviewing all the circumstances of the discharge, decided that submitting the grievance to arbitration was unwarranted. In granting summary judgment to the employer, the court said: "She had entrusted the enforcement of her rights to her union representative and, if the union failed to preserve them, her only recourse was against the union (*Parker v. Borock*, 5 N.Y.2d 156)." *Plagge v. R. H. Macy & Co.*, 28 Misc.2d 506 (First Dep't.).

FAILURE TO NOTIFY MVAIC OF ACCIDENT WITHIN NINETY DAYS OR AS SOON AS PRACTICABLE WITHOUT ANY REASONABLE EXCUSE results in loss of the right to arbitration. An injured party in an accident involving a New Jersey automobile attempted to sue the other driver but made no attempt to determine the insurance status of the automobile from the New Jersey Motor Vehicle Bureau until more than one year after the accident. This protracted delay in learning of the uninsured status of the car with the resultant failure to notify MVAIC of the claim until such late date constituted a material breach of the condition of the policy to notify the MVAIC within certain time limits and therefore the right to arbitrate was lost. *Marcus v. Motor Vehicle Accident Indemnification Corp.*, 29 Misc.2d 573 (Sup. Ct., Wasservogel, Spec. Ref.).

FOREIGN CORPORATION NOT HAVING FILED A CERTIFICATE OF DOING BUSINESS MAY NEVERTHELESS INITIATE ARBITRATION. The court denied a stay of arbitration in saying: "The contention of the respondent that the word 'action' [in section 218 General Corporation Law] encompasses a special proceeding within its generic sphere is not well taken in the light of the provisions of section 1459 [CPA]. In any event arbitration itself, as provided for in Article 84, is statutory. The present article [1450 as amended] eradicated many of the objectionable features existent at common law. Nowhere within the article does there appear to be provision for a proceedings to stay such as is involved here. It would appear that such question should be raised for the first time only on motion to confirm or disallow and not as thought here." *General Knitting Mills v. Rudd Plastic Fabrics Corp.*, N.Y.L.J., Feb. 27, 1961, p. 16 col. 3, Di Giovanna, J.

FEDERAL COURT DOES NOT HAVE POWER TO ORDER GOVERNMENT TO ARBITRATE the question whether a corporal in the military forces of the Kingdom of Belgium was a member of a "force" as defined in the North Atlantic Treaty. The plaintiff contended that the United States was liable under the Federal Tort Claims Act and provisions in the NATO Agreement which impose liability on it for tortious acts done in the performance of official duty by a member of a "force". The court held that the arbitration agreement in the treaty did not apply to this situation because the status of the foreign national was not subject to arbitration. The arbitration clause becomes operative only if a "member of a force" is involved and, if so, arbitration may be had to determine whether the tortious act of that member was done in the performance of his duty. *Robertson v. United States of America*, 294 F. 2d 920 (Dist. of Col. Cir., Danaher, C. J.).

FEDERAL COURT ENJOINS UNION FROM CARRYING OUT A PROPOSED STRIKE PENDING DECISION OF ARBITRATOR. Where the evidence established that a preliminary injunction restraining a union from engaging in a strike was necessary to preserve the purpose and procedures provided for by the Railway Labor Act, the court granted such relief. The court said: "The Norris-LaGuardia Act, 29 U.S.C.A. § 101 et seq., does not prohibit this Court from enjoining the threatened strike in this case." *Pennsylvania Railroad Co. v. Transport Workers Union of America, AFL-CIO,* 196 F.Supp. 867 (E.D. Pa., Wood, D.J.).

UNDUE DELAY IN SEEKING ARBITRATION AMOUNTED TO ABANDONMENT OF SUBMISSION where a party seeking a motion to compel arbitration waited two years after entering into the arbitration agreement. Citing *Zimmerman v. Cohen,* 236 N.Y. 15, the court said: "Were petitioner sincere in having the dispute arbitrated, he would not have waited almost two years to compel arbitration. Under these circumstances, the agreement to arbitrate was abandoned or waived." *Anchor Auto Sales Corp. v. Daly,* 219 N.Y.S.2d 499 (Sup. Ct., Groat, J.).

COURT DIRECTS ARBITRATION TO PROCEED WITHOUT THE NECESSITY OF A PROCEEDING TO COMPEL ARBITRATION under the provisions of section 1450 of the N. Y. Civil Practice Act. Citing the authority of *Demchick v. American Eutectic Welding Alloys Sales Co.,* 22 Misc.2d 920, 924, 201 N.Y.S.2d 819, 822, aff'd 11 App. Div.2d 771, 204 N.Y.S.2d 889, the court stayed a lawsuit pending arbitration and ordered the arbitration to proceed without an application to compel same. *Fisher v. Arch-Bilt Container Corp.,* 219 N.Y.S. 2d 669 (Sup. Ct., Conroy, J.).

IV. THE ARBITRATOR

AWARD EXCEEDING POLICY LIMITS VACATED on the grounds that the arbitrator had no power to make such an award under the contractual limits of the New York Automobile Accident Indemnification Endorsement. The arbitrator awarded $9000.00 to the wife for damages sustained as a result of the accident and $1,545.86 to the husband for medical expenses and loss of services of his wife as a result of the accident. The limit of liability under the policy is $10,000. The Court said: ". . . the award in its present form exceeds the limits of the policy and must be vacated under Sec. 1462, subd. 4, of the Civil Practice Act. However, we remit the matter to the same arbitrator for further proceedings as he may see fit to make a final and definite award for each plaintiff not in excess of policy limits." *Hughes v. Motor Vehicle Accident Indemnification Corp.,* Sup. Ct., Erie County, N. Y., Oct. 16, 1961, Lawless, J.

V. THE PROCEEDINGS

AGVA STANDARD FORM OF ARTISTS ENGAGEMENT CONTRACT DOES NOT REQUIRE THAT ARBITRATION BE CONDUCTED BY THE GUILD BUT IT PERMITS IT TO BE ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION. "To say. . .that the arbitration had to be conducted by AGVA in accordance with AAA rules would be to defeat the arbitration entirely and to subvert the real intention of the

contract." The court further said: "By their execution of the contract the parties conferred jurisdiction upon arbitrators to be appointed in accordance with the rules of the AAA; and, as stated in Section 3 of the AAA Rules, 'they thereby constitute the American Arbitration Association the Administrator of the arbitration'." *Forrest v. Hotel Conquistador, Inc.*, 14 Cal. Rptr. 349 (Dist. Court of Appeals, 2d Dist., Div. 2, Calif., Ashburn, J.).

VI. THE AWARD

AN ARBITRATION AWARD IS FINAL AND ENFORCEABLE AND MAY NOT BE CHALLENGED IN SUBSEQUENT COURT ACTION. The parties had entered into two agreements granting the plaintiff an exclusive distributorship in certain areas of soft drinks bottled by the defendant. Defendant claimed that the agreements were breached by the plaintiffs and arbitration ensued wherein the arbitrator awarded in favor of the defendant, terminating the exclusive distributor relationship between the parties. Plaintiff then brought an action to enjoin the defendant from interfering with plaintiff's distribution of defendant's products. Defendant moved for summary judgment, which was granted. The arbitrator's award was final and therefore no bona fide issue of fact exists in this action. *Grimaldi v. Coca-Cola Bottling Co. of N. Y.*, 29 Misc.2d 406 (Schwartzwald, J.).

COLORADO LAW UPHOLDS FINALITY OF ARBITRAL AWARD. "In Colorado, an arbitration award is not subject to review in the courts merely because one of the parties is dissatisfied with it, or solely for mistake in either the law or fact." *Gaddis Mining Co. v. Continental Materials Corp.*, No. 4438 Civil, U.S. D.C. Wyo., Aug. 9, 1961, Kerr, J.

ARBITRATION AWARD MAY NOT BE SET ASIDE ON GROUNDS OF ERRONEOUS FINDINGS OF FACT OR OF MISINTERPRETATION OF LAW. The court cited a dictum in *Wilko v. Swan*, 346 U.S. 427, wherein it was stated: ". . the interpretations of the law by the arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation. . ." (emphasis supplied). The Ninth Circuit, in trying to define "manifest disregard," said: ". . . manifest disregard of the law must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." For example, ". . . a manifest disregard of the law. . . might be present when arbitrators understand and correctly state the law, but proceed to disregard the same." *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Limited*, 293 F.2d 796 (9th Cir., Pope, C. J.).

MOTION TO VACATE MARITIME ARBITRATION AWARD MAY BE BROUGHT IN STATE COURT. Since the state courts have concurrent jurisdiction over maritime matters the charterer chose to seek vacation of an award in New York state court, relying upon the "saving to suitors" clause of 28 USC sec. 1333. The court held that "it should be clear by this time that maritime matters brought in the state courts pursuant to the 'saving to suitors' clause are not removable absent diversity of citizenship. . . The fact that the ultimate resolution may require the state court to apply federal law does not prevent remand. Where Congress has seen fit to grant concurrent jurisdiction to the state courts, they are competent to dispose of questions involving federal law." *Victorias Milling Co. v. Hugo Neu Corp.*, 196 F. Supp. 64 (S.D. N.Y., Edelstein, D. J.).

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